Neutral Citation Number: [2020] EWHC 3192 (Admin)

Case No: CO/3574/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/11/2020

Before :

MRS JUSTICE MAY DBE

- -

Between :

Vasile Done	**Appellant**
- and -	
Petrosani Court of Law Romania	**Respondent**

- -
- -

Martin Henley (instructed by **AM International Solicitors**) for the **The Appellant**
Tom Hoskins (instructed by **CPS Extradition Unit**) for the **The Respondent**

Hearing dates: 05 November 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mrs Justice May DBE:

Introduction

1. This is an appeal against an extradition order made on 9 September 2019. Permission to appeal was granted by Julian Knowles J on 14 May 2020 at an oral renewal hearing. There are two grounds of appeal: (i) whether the District Judge erred in finding that the appellant was a fugitive and (ii) whether proceedings on the current warrant constitute an abuse of process.

2. By two applications dated 14 October 2020 and 2 November 2020 the Respondent ("the JA") applied to adduce fresh evidence, consisting of four witness statements together with accompanying exhibits and further information from the Romanian court, directed at explaining some of the delay in this case. I considered the evidence *de bene esse*, reaching the view that it did not significantly affect my view of the outcome.

The European Arrest Warrant

3. The appellant is the subject of a conviction warrant which was re-issued on 3 June 2016 and certified by the NCA on 10 June 2016 ("EAW3"). Romania is a Category 1 territory for the purposes of Part 1 of the Extradition Act 2003.

4. Box E of EAW3 states that it relates to one offence occurring on the night of 3-4 May 2005. On that night the appellant, together with 3 other persons (and because of a previous altercation at the "Diana" nightclub on 1 May 2005) went to the home of Jurca Ioan and broke the windows of the apartment. When people connected to Jurca Ioan came out of the property and attended the appellant's home in retaliation (into which the appellant and his group had fled) the appellant is said to have thrown stones and Molotov cocktails into the opposing group. The Framework List is not ticked. In this jurisdiction the activity would constitute an affray or (more likely, given the incendiary devices) a violent disorder.

5. Despite stating on its face that EAW3 related to one offence, there is another matter referred to and relied upon in this way: the appellant had been before the court two years previously, on 26 August 2003, for three offences occurring on 4 May 2002. On that occasion the appellant caused disturbance on the terrace of a restaurant by throwing chairs at an advancing group of people. He then assaulted two of the group with a knife. The appellant was convicted and sentenced to 1 year imprisonment for the public order offence and 6 months' imprisonment for each of the assaults. At the time, these sentences were "pardoned" (ie suspended) for a period of 3years, subject to non-commission of further offences during that time. Following conviction for the offending on the night of 3-4 May 2005 the earlier sentences were activated. The activated sentences for the 2002 offending were ordered to run concurrently with each other (total 1 year) but consecutively to the sentence of 1 year 6 months imposed for the 2005 offending. The full period of 2 years 6months remains to be served.

6. The appellant was arrested on EAW3 on 20 May 2019 at his home address, by arrangement with local Northampton police. He was produced at court the following day and granted bail. The extradition hearing came before District Judge Coleman on

28 August 2019, following which she gave judgment and made the order on 5 September 2019.

History of Romanian proceedings and warrants

7. The appellant did not admit the 2005 offences, nor was he held on remand prior to his trial. On 21 November 2006 he attended before the Romanian court, where he was represented. He was summonsed in person and informed of the date, place and time of his trial but did not attend himself, although his lawyer was present. He was convicted and sentenced in his absence on 15 May 2007. On 17 May 2007 the appellant's lawyer lodged an appeal. This was rejected on 14 January 2008, as was a further appeal on 13 May 2008, on which date the sentence became final and binding in Romania.

8. On 21 May 2008 the JA issued a domestic warrant for the execution of the sentence. On 13 August 2008 the JA issued the first EAW ("EAW1"). The appellant was arrested on EAW1 in this country and remained in custody between 12-20 September 2013. The CPS subsequently invited the court to discharge EAW1 as it was deficient in that it was insufficiently particularised.

9. On 16 October 2013 the JA reissued the EAW ("EAW2"). The appellant was not arrested on EAW2 until April 2016. On 25 May 2016 the appellant was again discharged as EAW2 remained insufficiently particularised.

10. The present EAW3 was issued on 3 June 2016, however the appellant was not arrested until 20 May 2019. The further evidence submitted recently by the JA, and which I have considered *de bene esse,* provides no explanation at all for this delay, save only to say that Northampton police did not then have a dedicated warrants team (although they do now).

The District Judge's decision

11. DJ Coleman's decision is dated 5 September 2019. The appellant was unrepresented at the hearing but DJ Coleman (hereafter referred to as "the DJ") recorded that a duty solicitor at the initial hearing had raised issues under section 14 (passage of time), section 17 (speciality), section 20 (retrial rights) and section 21 (articles 3 and 8) of the Extradition Act 2003 ("the 2003 Act").

12. The DJ heard from the appellant with the aid of an interpreter. The JA was represented.

13. The DJ set out the evidence in her decision, recording that:

    (1) The appellant had come to the UK in January 2007 by himself to find work. His partner joined him 2 months later.

    (2) They have two children, born in 2008 and 2015, doing well at school.

    (3) The appellant's partner is a full-time mother, though attending college to improve her English.

(4) The appellant said that he had been allowed to stay in the UK in 2013, confirmed in 2016, by which the DJ understood him to refer to the two earlier EAWs which had been discharged because they were insufficiently particularised.

(5) He and his partner had been living in the same house for over 6 years, purchased with a mortgage in 2013.

(6) The appellant had been aware of the conditional pardon which he received in 2002, although he was unaware of the implications of re-offending within 3 years.

(7) The appellant accepted that he had appeared in court on 21 November 2006 and knew that it was for alleged further offending during 2005. He denied that his obligations on bail after that hearing included a requirement to notify any change of address. He had not told the authorities of his plan to come to the UK, nor sought their agreement; he had not thought it necessary.

(8) He knew that his parents had received a letter sent by the court, he also agreed that he had paid his lawyer to conduct the appeal against sentence. He knew that he had received a sentence of imprisonment but had stayed in the UK as his partner was then pregnant with their first child.

(9) The Appellant's partner gave evidence that she was a full-time mother, the family received child benefit; she had not made any enquiries about further financial assistance in the event of the appellant being extradited to serve his sentence. She denied that they had run away to avoid the appellant having to serve a sentence.

14. The DJ found that the appellant was an "entirely sincere and honest witness" who had "either misunderstood or was not informed about the consequences of events which had taken place before the Romanian courts in relation to both sets of proceedings". She accepted, however, the evidence of what had happened before the courts in Romania, concluding thus (at paragraph 24):

> "I am satisfied so I am sure that the requested person was aware that he had been convicted and had a prison sentence to serve and that the RP left the requesting state knowing that to be the case. I am satisfied that he is a classic fugitive…"

15. Having made this finding, the DJ went on to decide as follows:

(1) She dismissed any section 2 challenge, on the basis that "the omissions in the EAWs which were previously discharged have been remedied".

(2) Applying *Wisniewski v Poland* [2016] 1 WLR 1750, she decided that the appellant was a fugitive and was not entitled to rely on the s. 14 bar. The DJ observed that if she was wrong about his fugitive status there was nevertheless insufficient change of circumstance in the intervening period to amount to oppression.

(3) The speciality challenge was misconceived.

(4) The section 20 bar did not apply

(5) The diplomatic assurance provided was sufficient to satisfy any Article 3 concerns about prison conditions on return.

16. In conducting the balancing exercise under Article 8, the DJ recorded factors in favour of extradition as follows:

(i) Public interest in seeing that persons convicted of crimes should serve their sentences. In this case the offences were serious and involved violence. There were threats with the use of a knife. The victims sustained injuries. "He has evaded attempts to get him to prison".

(ii) The public interest in honouring international obligations is very high.

(iii) The UK should not become a safe haven for fugitives.

(iv) The appellant was a repeat offender within Romania.

(v) The appellant was a fugitive.

(vi) Although the offending was in 2005 there was no culpable delay by the JA.

17. Factors against extradition were set out by the DJ as follows:

(i) The Appellant had been living in the UK since January 2007 and had built a life here "but the foundation of that life is as a fugitive".

(ii) The appellant had worked hard throughout, earning above the national average enabling him to buy his house on a mortgage.

(iii) He had not offended whilst in the UK.

(iv) He had a positive reference from his employer.

(v) He had two children whom he supported without recourse to public funds.

(vi) There would be financial hardship and emotional upset if the appellant were to go back to Romania. They had spent all their lives in the UK and were unlikely to go back to live there whilst he served his sentence.

(vii) There had been considerable delay, in respect of which the JA appeared to be blameless. Such delay "may well be attributable to the NCA, it is certainly not the fault of the [appellant]".

18. Weighing up these factors the DJ concluded that the balance lay in favour of extradition, notwithstanding the delay.

19. Finally, applying the test in *USA v Tollman* [2008] EWHC 184 (Admin) the DJ decided that the circumstances under which 2 previous EAWs had been discharged could not amount to abuse of process.

The law

Passage of time

20. The relevant provisions in the 2003 Act are to be found under section 11 and section 14:

> *"Bars to extradition*
>
> *11(1) If the judge is required to proceed under this section he must decide whether the person's extradition to the category 1 territory is barred by reason of . . . (c) the passage of time . .*
>
> *...*
>
> ***Passage of time***
>
> *14. A person's extradition to a category1 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have - (a) committed the extradition offence (where he is accused of its commission), or (b) become unlawfully at large (where he is alleged to have been convicted of it)."*

Fugitive status

21. The question of whether or not an individual facing extradition is to be regarded as fugitive is critical to the application of the statutory bar under section 14 as well as to the proportionality balance under Article 8. In *Wisniewski*, the Divisional Court (Lloyd-Jones LJ and Holroyde J) reviewed the authorities and described fugitive status in this way, at [59]:

> "Mr Jones submits that in the passage in his speech in *Kakis's* case referred to in Gomes's case as Diplock para1, Lord Diplock was limiting the concept of a fugitive to cases where the person had fled the country, concealing his whereabouts or evading arrest. However, I consider that these were merely examples of a more general principle underlying *Kakis's* and *Gomes's* cases. 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 to extradition. Rather than seeking to provide a comprehensive definition of a fugitive for this purpose, it is likely to be more fruitful to consider the applicability of this principle on a case by case basis."

22. The court went on to consider the application of the principle to three separate cases involving the passing of a suspended sentence by a Polish court. Key to its decision in each case was the fact that the sentences all had conditions attached, requiring the appellants in each case to stay in touch with probation and/or to notify of a change of

address. On leaving to come to the UK the appellants had been in breach of one or both such conditions. In the judgment of the court this rendered them fugitives:

> "60. …the activation of the sentence need not be an inevitable consequence of the appellant's conduct. I consider that a person subject to a suspended sentence who voluntarily leaves the jurisdiction in question, thereby knowingly preventing himself from performing the obligations of that sentence, and in the knowledge that the sentence may as a result be implemented, cannot rely on passage of time resulting from his absence from the jurisdiction as a statutory bar to extradition if the sentence is, as a result, subsequently activated. The activation of the sentence is the risk to which the person has knowingly exposed himself. In my view, such a situation falls firmly within the fugitive principle enunciated in *Kakis's* case [1978]1WLR779 and *Gomes's* case [2009]1WLR1038. The fact, if it be the case, that a person's motive for leaving the jurisdiction was economic and not a desire to avoid the sentence, does not make the principle inapplicable.
>
> …
>
> 62. … It is not necessary, in order that a requested person be treated as a fugitive, that he knows that his sentence has been activated. It is enough that he knows that it is liable to be activated because of his breach of the terms of its suspension. Any other approach would be inconsistent with the principle in *Kakis's* and in *Gomes's* cases and would introduce considerable uncertainty into this area of the law. In particular, as Ouseley J points out, a person who breaches conditions of his sentence which require him to keep in contact thereby becomes somebody whose whereabouts are unknown to the authority which is entitled to know of them and puts it beyond the authority's power to deal with him. It is his conduct in breach of the suspended sentence that has given rise to his lack of knowledge that the sentence has been implemented. He has as a matter of choice placed himself beyond the reach of the criminal justice system concerned. I consider that he is properly to be regarded as a fugitive from the legal process in his case. Where he has, in this way, brought about the delay himself, the passage of time bar should not be available to him."

23. At this point in its judgment the court was dealing with the applicability of the time-bar under s.14 of the 2003 Act, but the question of whether or not a person facing extradition has deliberately put themselves beyond the reach of a legal process is also relevant to a consideration of proportionality under Article 8. It is relevant as one of the strong public interest considerations in favour of extradition is that the UK should not be, or be seen to be, a "safe haven" for fugitives.

Article 8 ECHR

24. In accordance with the well-known directions given in *Celinski v Polish Judicial Authority* [2015] 1 WLR 551, judges faced with an Article 8 proportionality issue are required to carry out a balance sheet enquiry into factors for and against extradition. In *HH v Deputy Prosecutor for the Italian Republic, Genoa* [2012] UKHL 25, the Supreme Court described the nature of an Article 8 enquiry and the relevant factors at play as follows:

> "…the court ..has to examine carefully the way in which [extradition] will interfere with family life. (2) there is no test of exceptionality in either context (3) the question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition. (4) there is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people conviction of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no 'safe havens' to which either can flee in the belief that they will not be sent back. (5) that public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crimes involved (6) 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. (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

25. Although the public interest in extradition is likely in most cases to outweigh the article 8 rights of the family, there have been cases where, even though the requested person came to the UK as a fugitive, the court has nevertheless concluded that a very lengthy passage of time, taken together with changes occurring during that time, made it disproportionate to order extradition: see the decision of Hickinbottom J in *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 and the cases to which he refers at [70 vi)].

Abuse of process

26. Abuse of process in the extradition context was considered by the Divisional Court in *Camaras v Baia Mare Local Court, Romania* [2016] EWHC 1766 (Admin). The case involved repeated discharge and re-issue of an EAW in circumstances where the requesting state had failed to clarify the question of re-trial rights. The district judge had found that the requested person in that case was not a fugitive but nevertheless concluded that it was proportionate to order his return. The court (McCombe LJ and Ouseley J) allowed the appeal on Article 8 grounds, having dismissed an abuse of process argument. It held that, although there remained a residual power to consider abuse of process, in cases such as the one before it where the alleged abuse consisted of repeated discharge on account of deficiencies in the warrant that could not (of

itself) prevent enforcement of a re-issued warrant. The circumstances of unfairness or oppression which might arise by reason of such a history were more suitably considered and determined under s.14 and s.21/article 8. To extend the *Henderson v Henderson* doctrine to encompass repeated re-issue of the EAW, would risk undermining the statutory process itself: see [27]-[29] and [33]-[34].

27. To the extent that the Divisional Court in *Camaras* ruled out an abuse argument succeeding in the absence of bad faith or deliberate manipulation of the process, this has been re-visited by the Divisional Court (Davis LJ and Swift J) in *Jasvins v Latvia* [2020] EWHC 601 (Admin). That case concerned an EAW which had been re-issued after an appeal was allowed against an extradition order made on the previous warrant. The appeal against the first EAW had been allowed because the requesting state had failed, in breach of a court order, to provide an explanation addressing an allegation of prosecutorial/police abuse. The response of the requesting state to the success of the appeal against the first EAW was to re-issue, this time accompanied by the necessary explanation. The district judge made an extradition order on the second warrant, dismissing an abuse argument. The Divisional Court allowed the appeal, holding that this was a *Henderson v Henderson* type abuse, being in effect a collateral attack on the decision of the appellate court in this jurisdiction on the first EAW. In his judgment Davis LJ referred to *Giese v United States* [2018] EWHC 1480 (Admin) and *Auzins v Latvia* [2016] EWHC 802 (Admin), observing that *Camaras* needed to be read in the light of the judgments in those cases. He cited the following passages from the judgment of the Lord Burnett CJ in *Giese*:

> "32. The key, in our judgment, to cases where it is said that the requesting state failed in the first set of proceedings such that the second set are an abuse of process is to make a "broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case": see Johnson v Gore Wood & Co [2002] 2 AC 1, para 31 and Arranz v Spain [2016] EWHC 3029 (Admin) at [32]–[33]; [2017] ACD 12. Such a broad, merits-based judgment should take account of the fact that there is no doctrine of res judicata or issue estoppel in extradition proceedings.
>
> 33. Underlying extradition are important public interests in upholding the treaty obligations of the United Kingdom; of ensuring that those convicted of crimes abroad are returned to serve their sentences; of returning those suspected of crime for trial; and of avoiding the United Kingdom becoming (or being seen as) a safe haven for fugitives from justice. The 2003 Act provides wide protections to requested persons through the multiple bars to extradition, Parliament originally and through amendment, has enacted. There are likely to be few instances where a requested person fails to substantiate a bar but can succeed in an abuse argument."

28. In *Jasvins*, Davis LJ concluded as follows:

> "17. It is clear from the outcomes reached in *Giese* and *Auzins* that there is no necessary conclusion that proceedings on a second (or later), warrant will amount to an abuse of process with the consequence that those proceedings will be dismissed. Far from it. In *Auzins* the second warrant was consequent on improvement in prison facilities in Latvia, which meant that appropriate medical treatment could be available for the requested person. In Giese the second request for extradition was accompanied by improved assurances as to the form of detention order to which the requested person would be subject if convicted. In each instance, considering the circumstances in the round, pursuit of a further extradition request could not be characterised as any form of subversion of the statutory provisions, let alone oppression of the requested person. These two cases alone make it clear that any application of the rule in Henderson's case must be measured in specifics and the circumstances of the case in hand. There can be no one-size-fits-all approach."

29. I draw the following broad principles from these cases:

    (1) The *Henderson v Henderson* principle is capable of application in the extradition context, albeit recognising that there is no doctrine of res judicata or issue estoppel applicable to extraditions on account of the important public interests which underpin such proceedings: *Camaras; Giese*.

    (2) Accordingly, the principle will not ordinarily be applicable to the straightforward situation where a warrant has been re-issued following a finding that the earlier warrant was deficient: *Giese; Jasvins*.

    (3) Unfairness or oppression arising from the history of proceedings in a particular case will generally fall for consideration and decision under one of the statutory bars. These cater for a wide range of circumstances such that it will be rare for any question of abuse to arise: *Giese*.

    (4) Nevertheless there remains a residual abuse jurisdiction, to be "measured in specifics", and exercised only on the facts of a particular case: *Jasvin.*

The role of the appellate court

30. The task of an appellate court considering appeals from the decision of a District Judge has been considered in a number of cases, authoritatively summarised by Lord Thomas CJ in the following passage from his judgment in *Celinski* at [14]:

> "14 The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong…that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In

> answering the question whether the district judge, in the light o those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

31. A more recent expression of the appellate approach is to be found in the Divisional Court case of *Love v Government of the United States of America* [2018] 1 WLR 2889, in the judgment of Lord Burnett CJ at [25]-[26]. The court in Love was not considering an Article 8 case, but these dicta are plainly of wide application:

> "25. …The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not rehearings of evidence or mere repeats of submissions as to how factors should be weighted; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh….
>
> 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."

The parties' competing arguments

(i) Abuse

32. Mr Henley's overriding argument was that the three occasions upon which the appellant had been subject to extradition proceedings rendered the third attempt at enforcing the warrant an abuse. It was known that the CPS had requested discharge of EAW1 in 2013, for want of sufficient particulars. However nothing was known, he pointed out, about the circumstances under which EAW2 had been discharged in 2016, only that DJ Inyundo had found it to be deficient again. But in the absence of any record being produced of the District Judge's decision on that occasion, or of any orders which may have been made prior to and for the purposes of that hearing, the respondent could not show that the repeated re-issue was not abusive. His client had been prejudiced by the delay, Mr Henley argued, on account of his second child being born in 2014, some 9 or 10 months after EAW1 was discharged.

33. Mr Hoskins, for the JA, submitted that the circumstances of this case were very different to that faced by the court in *Jasvins*. This was not one of the rare cases, he argued, where the appellant's circumstances fell outside the operation of the statutory

bars. He pointed to the DJ's recital of the history of proceedings: that the CPS had asked for the first warrant to be discharged (paragraph 9 of the judgment) after which EAW2 had been issued promptly. At the extradition hearing which followed EAW2 had also been discharged "as the amended warrant remained section 2 deficient". There was nothing in that history, Mr Hoskins pointed out, which came anywhere near the circumstances giving rise to the collateral attack identified in *Jasvins*.

(ii) Fugitive status

34. Mr Henley next submitted that the DJ had erred in concluding that the appellant was a fugitive. He relied in this respect on the cases of *Pillar-Neumann* [2017] EWHC 3371 (Admin) and *De Zorzi* [2019] 1 W.L.R. 6249. The requested persons in each of those cases had not been in breach of any conditions imposed in the requesting state upon leaving to return to their home country. In each case they had been tried and convicted in their absence. Mr Henley argued that the position of the appellant here was analogous, as there had been no conditions restricting his movement out of Romania in January 2007. The sentence passed for offences committed in 2002 had been suspended for 3 years on condition no further offences were committed. In January 2007 the 2005 offences were under investigation only, there had been no trial and no conviction when the appellant came to the UK. The appellant told the DJ in evidence, and she accepted, that he was unaware of any restriction on his leaving Romania or any requirement that he inform the authorities of any change of address. The further information contained in the recent application confirmed this:

"*During the established term of 3 years, no obligation was imposed on the name Done Vasile*"

and

"The named Done Vasile was not arrested on remand for the deed of 3/4.05.2005.

The named Done Vasile was not under any condition during the investigation and judicial proceedings regarding the crimes committed on May 3-4, 2005."

35. Mr Henley, argued that, in circumstances where there was no restriction upon the appellant leaving Romania, he could not properly be characterised as a fugitive. The DJ's finding (at paragraph 24 of her judgment) that the appellant had "either misunderstood or was not informed about the consequences of events which had taken place before the Romanian courts in relation to both sets of proceedings" could only be understood as a finding that, when he left Romania to come to the UK, the appellant had been unaware of the risk of activation of his earlier "pardoned" sentence. That sentence had had no condition requiring him to stay in Romania, or to notify of any change of address. Mr Henley submitted that the DJ had been wrong to find that the appellant "was aware that he had been convicted and had a prison sentence to serve…" when he left Romania in January 2007. At that time, the appellant had not yet been tried, let alone convicted, of the later offences and until he was, the earlier sentence could not have been activated.

36. Alternatively, Mr Henley submitted, if the appellant was a fugitive when he left Romania, he ceased to be so when he was arrested in 2013 on EAW1. He referred me

in this connection to the discussion in *Kakis v Cyprus* [1978] 1 WLR 779 at 782-3. From the time of his first arrest in 2013, Mr Henley argued, the appellant was not outside the reach of the Romanian legal process, but on the contrary very much subject to it.

37. Mr Hoskins argued that the appellant's situation was different to that of the individuals in *Pillar Neumann* or *De Zorzi*: in the first place neither of the requested persons in those cases had been subject to a suspended sentence. The situation here was much more akin to that in *Wisniewski*, he pointed out. Although there may not have been explicit conditions requiring the appellant to notify the authorities of his address, or to stay in touch with probation, nevertheless he was in fact at risk of his sentence being activated in the event of his being convicted of the subsequent offences, for which he knew he was going to be prosecuted and tried. He knew this because he had been told it at the hearing he attended with his legal representative, in November 2006, just weeks before he left Romania to come to the UK.

38. The next important point of difference between the appellant and the requested persons in *Pillar Neumann* and *De Zorzi*, Mr Hoskins argued, was that the persons in those cases were either living in their home country at the time when proceedings against them were instituted in the requesting state (*Pillar Neumann)*, or had returned to their home country very soon after proceedings were started, to an address of which the authorities were at all times well aware (*De Zorzi*). When he left Romania for the UK in January 2007 this appellant was not returning home, nor was his UK address known to the Romanian authorities. At the time he left he had been resident in Romania for all of his life to-date and he was aware that the authorities had a Romanian address for him. Mr Hoskins argued that the DJ's conclusion at paragraph 24 of her judgment that the appellant "was aware he had been convicted and had a prison sentence to serve.." should be understood as a reference to his earlier conviction and suspended sentence, which was at risk of activation when he left, owing to the prosecution of which he was then aware.

(iii) Section 14 and Article 8

39. Mr Henley accepted that if the appellant was properly to be characterised as a fugitive over the entire period since coming to the UK in 2007 then the section 14 statutory bar was unavailable to him. On the other hand if, as Mr Henley submitted was the case, the appellant was not to be regarded as a fugitive for some or all of the intervening years then it would be oppressive for him to be required to return, having regard to the children which he has had and the stability of the family life which he has established in this country during that time.

40. Turning to Article 8 and the proportionality balance, Mr Henley's primary case was that the exercise conducted by the DJ had been grossly skewed by her finding that the appellant had been a fugitive. In any event, he argued, the delay taken together with the other factors against extradition operating in his case, meant that extradition was disproportionate. He relied on the following circumstances in particular:

(i) The appellant has been arrested and released twice, on each occasion believing that proceedings were over. The JA, and the authorities here, have been well aware of his address in the UK since at least 2013.

(ii) His youngest child was born here, after EAW1 had been discharged. The children have both been raised here, gone to school here, their lives are here such that they will stay if he is returned to Romania.

(iii) He has bought a house, is fully employed, with a positive character reference from his employer. The family is financially independent, he pays taxes.

(iv) He has no convictions in the UK.

(v) The offences in Romania are now very old.

(vi) The appellant has effectively had his freedom of movement restricted since the issue of EAW1, because of the delay in issuing and executing a valid warrant.

41. Mr Hoskins' primary submission was that the DJ's conclusion as to the appellant's fugitive status was correct. In any event, he argued, she had reached the correct conclusion on oppression. Having considered the evidence the DJ concluded that, even if the appellant was not to be regarded as a fugitive, he had not shown the necessary degree of change since 2007 as to render his return oppressive (paragraph 25 of the judgment). Mr Hoskins said that the DJ had been right to come to this conclusion, pointing out that Mr Henley had been able to identify nothing in his client's circumstances which could properly amount to oppression.

42. As to Article 8, Mr Hoskins submitted, the DJ had conducted the correct balancing exercise and her conclusion could not be faulted.

Discussion and conclusions

Abuse of process

43. It is convenient to deal with the issue of abuse first in this case, although all matters are plainly interrelated.

44. Having regard to the principles which I have endeavoured to summarise at [29] above, I am quite satisfied that this is not an appropriate case to view through the prism of the *Henderson v Henderson* principle. Despite Mr Henley's ingenious arguments, I can see nothing in the history of deficient, and then re-issued, warrants to suggest that enforcing EAW3 would, of itself, be an abuse of process. This is a case where the facts and the arguments sit most comfortably within, and can properly be addressed by, one or more of the statutory bars.

Fugitive status

45. The question of whether the appellant was a fugitive, and if so for what period, bears not only upon the operation of the statutory bar under section 14 of the 2003 Act, but is also a factor in the Article 8 Celinski balancing process.

46. The test for fugitive status is whether the person has knowingly placed themselves beyond the reach of a legal process – see *Wisniewski* at [59]. As the court pointed out in that case, the issue is likely to be determined on a case by case basis. It is an

objective question, but with a subjective element "deliberately and knowingly placed himself beyond…"- see *De Zorzi* at [48].

47. In *Wisniewski* the fact that the requested persons had known of the conditions attaching to their suspended sentence, knew that they were in breach of those conditions, and thus to be at risk of activation when they left to come to the UK, meant that they had properly been treated as fugitives.

48. In the present case the sentence passed in respect of the 2002 offending was not subject to any conditions of supervision, reporting, or notification of change of address. When the appellant left for the UK in January 2007 he could not be said to have been in breach of any requirement. I have some difficulty, therefore, in reconciling and understanding these two sentences in paragraph 24 of the DJ's judgment:

> "…he either misunderstood or was not informed about the consequences of events which had taken place before the Romanian courts…"

and

> "I am satisfied so I am sure that the [appellant] was aware that he had been convicted and had a prison sentence to serve and that [he] left the requesting state knowing that to be the case."

If, in the second of the above passages, the DJ intended to refer to the appellant's conviction in 2003, then unless or until the appellant was convicted at trial of the later offending there was no sentence to serve; moreover the first of the above findings is to the effect that the appellant was unaware that the earlier sentence could be activated if he committed any further offences. If, in the second passage, the DJ was referring to a conviction for the later offending then she was in error, as the appellant had not yet been tried by the time he left Romania in January 2007 and could not have been aware of any such conviction.

49. It is not entirely clear, therefore, by what reasoning the DJ arrived at her conclusion that the appellant was a "classic fugitive", in particular how she dealt with the subjective element of the *Wisniewski* test. Nevertheless there is a clear finding that the appellant was unaware of the fact that his earlier sentence could be activated if he was convicted of the later offending (see paragraph 19 of her judgment, taken together with the first of the above passages from paragraph 24) and it is on that basis that I approach the question of fugitive status. I cannot reconcile the second of the above passages; accordingly I have ignored that finding for the purposes of considering the fugitive issue.

50. When he left in January 2007 the appellant had not been convicted of any further offences, albeit that he knew he was to be tried on another charge later that year. He had denied any involvement in the 2005 public order offending and unless or until he was found guilty at trial there could be no question of the earlier sentence being activated. The fact that he knew he was to be prosecuted and tried for the 2005 offending cannot, of itself, be sufficient to render him a fugitive; if this alone was enough then the requested person in the case of *De Zorzi* would have been a fugitive.

51. In her judgment (at paragraph 20) the DJ refers to the appellant being "on bail" after the hearing which he attended in November 2006, suggesting that, as would be the case in this jurisdiction, the appellant was subject to a requirement to attend his trial. When I raised this with Mr Henley, he argued that "bail" does not have the same connotation in Romania as it does here, that in such civil law jurisdictions it is common for an accused not to attend their trial in person, but only by their legal representative. Mr Hoskins submitted that, in the absence of any evidence on the point, it was significant that the judge had used the term in the context she did, in her reasoning as to whether when he left Romania the appellant did so as a fugitive.

52. As the court pointed out in *Wisniewski*, each case will depend on its own facts. The test is whether, when he left Romania in January 2007, the appellant knowingly and deliberately placed himself beyond the Romanian legal process. I have concluded that he did. His lack of awareness of the consequences of further offending in terms of activation of the earlier sentence is only one part of the picture in his case; in any event he was not at risk of activation unless or until he had been found guilty of the 2005 offending. Nevertheless, in my view the facts are nearer to those of the cases considered in *Wisniewski* than they are to *Pillar Neumann* or *De Zorzi*. In *Pillar Neumann* the requested person had married a UK citizen and come to the UK some years before proceedings against her started in Germany. In *De Zorzi* the requested person left France in order to return to her home country, in circumstances where the French authorities knew that she was a Dutch citizen and where they had an address for her in that country.

53. Here, although the district judge found that the appellant did not know the implications of the conditional pardon, there are additional facts which, taken all together, indicate that he was a fugitive when he left Romania: he was aware that he had been charged with further offences, he knew that the authorities had an address for him within the jurisdiction (his parent's address), he did not tell them that he was leaving or where he was going, nor did he give them a new forwarding address in the UK. I conclude that, when he left for the UK just weeks after the hearing in November, the appellant was knowingly placing himself beyond the reach of the relevant legal process. In other words, he is to be regarded as a fugitive, even though he was unaware, when he left, that the earlier sentence could be activated in the event of his later conviction for the 2005 public order offence.

54. I am unable to conclude that the appellant's status as a fugitive changed upon his first arrest in 2013. Mr Henley referred to *Kakis*'s case in support of his argument on this point. In that case the Supreme Court held that Kakis had been a fugitive whilst hiding in the mountains of Cyprus but ceased to be so when a new government declared a political amnesty, after which he moved to the UK. After he came to the UK, the Cypriot government changed once more, rescinded the amnesty and sought his extradition. In these circumstances, the court held, Kakis ceased to be a fugitive from the time he came out of hiding in the mountains. Mr Henley sought to apply the same principle to the present case but in my view the facts are very different: Kakis was at all relevant times present in Cyprus, he avoided the legal process by hiding in the mountains, not by leaving the jurisdiction. 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.

55. It follows that the DJ was right to find that the section 14 bar was unavailable. But even if I am wrong in my conclusion about the appellant's fugitive status, whether for the whole or part of the period, I accept Mr Hoskins' submission that the evidence cannot establish that extradition would be oppressive.

Article 8 balance

56. Although, as I have found, the appellant is to be treated as a fugitive from the time he left Romania in 2007, the effect of this is necessarily nuanced when it comes to an assessment of the Article 8 balance. The fact that, as a fugitive, the passage of time is not relevant for the purposes of section 14, does not mean that it is irrelevant to the proportionality determination required by Article 8. There have been periods of delay in the appellant's history which cannot properly be attributed to his fugitive status: at all times after the appellant's arrest in 2013 his whereabouts were known yet he was not arrested on EAW2 (issued in October 2013) until April 2016 (some 2 ½ years) and it took almost 3 years between the re-issue of EAW3 (in June 2016) and his arrest on 20 May 2019. The lapse of 5 ½ years in all, accompanied by two occasions where the warrant was discharged giving rise to a perception on the appellant's part that proceedings may now have been resolved, is a significant circumstance to weigh in the proportionality balance.

57. The DJ recognised delay as a factor against extradition, notwithstanding her decision on fugitive status. She put it in this way, in the balance sheet exercise at paragraph 29 of her judgment:

> "7. *There has been considerable delay in these proceedings being finalised. The initial delay from 2008-2013 was not delay attributable to the requesting state. The RP had not been located. The first discharge on the EAW was 23rd September 2013. The replacement EAW was issued on 16th October 2013. The RP was arrested on that warrant in April 2016 and it too was discharged the same month, April 2016. By that stage both the J/A and the NCA knew the RP's address and I do wonder therefore why it took 2years and 6 months for him to be rearrested. The instant EAW was issued in June 2016 and it took until May 2019 for that warrant to be executed. The requesting state appears to blameless here (sic). There is no explanation for the considerable delay and in the meantime the RP has continued his life in this country. This very lengthy delay, which may well be attributable to the NCA, is certainly not the fault of the RP*."

58. The DJ reverted again to the delay in articulating her conclusion:

> "*There are strong factors in favour of extradition, however there are also strong countervailing factors, not least the considerable delay. I am satisfied however that the factors in favour of extradition outweigh those which may militate against it*."

59. These passages show that the DJ took into account the culpable/unexplained delay. However, she appears to have concluded that the JA was "blameless", and to have regarded that as a counterbalance to the extent and weight of the delay, without reflecting that the occasion for the delays was that EAW1, and then EAW2, had not been drafted in compliance with the Framework Decision.

60. This treatment of the delay, taken together with the confusing finding that the appellant left Romania knowing that he "had a prison sentence to serve" (at paragraph 24 of the DJ's judgment, as discussed above), when he did not, has persuaded me that the DJ erred in addressing the proportionality balance.

61. The DJ correctly referred to the strong public interest factors in favour of granting extradition. She rightly characterised the offending as serious. She was entitled to take into account the fact that the appellant was a fugitive and that it had taken some years for him to be located.

62. However the cases show that long unexplained delays may weigh heavily in the balance against extradition, even where the appellant is a fugitive: see *Stryjecki* where Hickinbottom J (as he then was), having upheld the DJ's finding in relation to fugitive status, nevertheless decided that the DJ had reached the wrong decision, in view of the length of the delay combined with a number of other considerations which applied in that case. As he emphasised, each case will depend on its facts.

63. In this case the following factors appear to me to be particularly relevant:

    (1) The offending was a long time ago, in 2002 and 2005. Although the appellant has a right of re-trial in relation to the 2005 offence (which he has always denied) the events giving rise to that offence are now 15 years ago.

    (2) The appellant was aged 20 at the time of the offences in 2002, and 23 in May 2005. He was not then married and had no children. He is now aged 39, fully employed in a settled life with two children at school in the UK. As Baroness Hale said in *HH* at [8(6)]:

    > "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"

    (3) For the last 7 years the appellant, his wife and children have lived in the same house which he and his wife purchased with a mortgage in 2013. He has committed no offences since his arrival in the UK in 2007.

    (4) The length of delay and the circumstances in which it has arisen are such as to reduce the weight to be attached to the public interest very considerably: The crimes were committed 15/18 years ago. Even though, as the district judge found, the appellant left Romania without informing the Romanian authorities where he was going, the delays since then have been very lengthy indeed; for at least the 5½ years from 2013-19 they cannot be explained by the appellant's status as a fugitive. The authorities have known the address of his family home in the UK, where he has been living openly, working, paying taxes and a mortgage, since his arrest on EAW1 in 2013. EAW1 was discharged in 2013

for want of particularity, then EAW2 in 2016 for the same reason. It is right that the JA re-issued promptly, but there would have been no need for re-issue if EAW1 or EAW2 had been properly framed. These two events of re-issue were the occasion for two long and culpable delays on the part of authorities in the UK. Meanwhile the appellant and his wife had a second child and became ever more settled.

(5) The entire family, the appellant, his wife and their children, have twice faced the uncertainty and expense of extradition proceedings, then (twice) resumed normal life only to find the appellant being re-arrested to face the same charges again, accompanied by all the attendant worry and instability.

(6) The most recent Further Information does not provide any real explanation for the delays. The brief moment in 2013 when the appellant, stopped in his car and faced with arrest, sought for a short time to say he was his brother, is to my mind, of very little relevance.

64. Applying the test articulated in *Love*, standing back and considering the overall evaluation, I am persuaded that the DJ in this case reached the wrong decision. In my view it would be disproportionate on the particular facts of this case – and each case must turn on its own facts – to extradite the appellant on EAW3.