Neutral Citation Number: [2022] EWHC 2217 (Admin)

Case No: CO/2388/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 August 2022

Before :

MR JUSTICE WALL

- -

Between :

VIOREL NONEA

Appellant

- and -

JUDECATORIA ORADEA ROMANIA

Respondent

- -
- -

Mr Benjamin Joyes (instructed by Taylor Rose) for the Appellant
Mr Stefan Hyman (instructed by CPS Extradition) for the Respondent

Hearing date: 20 July 2022

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mr Justice Wall:

1. On 5 July 2021 District Judge Robinson ordered the Appellant's extradition to Romania. Extradition had been requested in respect of six offences of which the Appellant had been convicted and for which he had been sentenced to a custodial term of 2 years 10 months. The District Judge ordered his extradition in respect of three offences (driving a motor vehicle without a licence on 24 April 2018, 28 April 2018 and 31 October 2018) but refused it in respect of three other offences relating to driving a motor vehicle which was not properly registered; those offences having been committed on the same dates as the offences of driving without a licence. The refusal was on the basis that the Romanian offences of driving a vehicle which was not properly registered had no equivalent in English law and, therefore, were not extradition offences. That decision has not been challenged. The sole challenge before this court is whether, that decision having been made, the District Judge was wrong to conclude that extradition for the remaining offences would not lead to a violation of the principle of specialty under s17 Extradition Act 2003 ("the Act"). (Other issues were argued at first instance and/or advanced as alternative grounds of appeal: all of those have since been abandoned).

2. The essential chronology of this case is as follows:

   i) The Appellant was sentenced to a term of 2 years 10 months on 1 September 2020 in respect of the six offences of which he then stood convicted. That sentence was made final (meaning that the time for appeal had elapsed) on 22 September 2020.

   ii) The European Arrest Warrant ("the EAW") was issued on 23 September 2020 and certified by the National Crime Agency on 21 October 2020.

   iii) The Appellant was arrested on the "EAW" on 24 October 2020. He made his first appearance at Westminster MC on 26 October 2020.

   iv) The full extradition hearing took place on 28 April 2021 and, following further information being asked for and received on a discrete and, for the purposes of this appeal, irrelevant issue, the reserved judgment handed down on 5 July 2021.

   v) The application for permission to appeal was refused on paper by Sir Ross Cranston on 22 November 2021 but granted at an oral hearing by Lane J on 9 February 2022.

3. This appeal is centred on the way in which Romania sentences offenders for multiple offences. Romania, in common with most if not all other states, has regard to the issue of totality when an offender is sentenced for more than one offence at the same time. It deals with that issue by the application of a formula which involves the court in determining the most serious (or longest) sentence appropriate for any single offence and adding to it one third of the combined appropriate sentences for all other offences. This results in a single sentence being imposed for the totality of an offender's criminality (known as the "resulting penalty") and not a series of individual sentences tailored to the seriousness of each offence committed. The difficulty this poses, it is said, is that if, as in this case, an offender is extradited to Romania in respect of some but not all of the offences which together formed the basis for the "resulting penalty",

the sentence originally imposed would have to be varied in some way (disaggregated) in order to ensure that the offender does not serve part of his sentence in respect of offences for which he was not extradited. It is submitted that in Romania there is no effective method of ensuring that this happens.

4. The duty on a Member State to ensure that an extradited offender (or indeed suspect) is not dealt with for offences for which he was not extradited stems from Article 27 of the Framework Decision. That imposes on Member States the duty, subject to exceptions which are of no application in this case, to ensure that, "*a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for offences committed prior to his or her surrender other than that for which he or she was surrendered".*

5. The requirement to recognise that duty is found in s17 of "the Act": (emphasis added):

> "(1) **A person's extradition to a category 1 territory is barred by reason of specialty if (and only if) there are no specialty arrangements with the category 1 territory**.
>
> (2) **There are specialty arrangements with a category 1 territory if, under the law of that territory or arrangements made between it and the United Kingdom, a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if— (a) the offence is one falling within subsection (3)**, or (b) the condition in subsection (4) is satisfied.
>
> (3) **The offences are— (a) the offence in respect of which the person is extradited**; (b) an extradition offence disclosed by the same facts as that offence; (c) an extradition offence in respect of which the appropriate judge gives his consent under section 55 to the person being dealt with; (d) an offence which is not punishable with imprisonment or another form of detention; (e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal; (f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.
>
> (4) The condition is that the person is given an opportunity to leave the category 1 territory and— (a) he does not do so before the end of the permitted period, or (b) if he does so before the end of the permitted period, he returns there. (5) The permitted period is 45 days starting with the day on which the person arrives in the category 1 territory".

6. It has been transposed into Romanian law in Article 117 of Law 302/2004 which reads, "*… a person surrendered to the Romanian authorities may not be prosecuted, sentenced or otherwise deprived of his/her liberty for a different act committed prior to his or her surrender other than that for which he/she was surrendered unless the executing Member State gives its consent"*. There are exceptions to this Rule which do not touch upon the facts behind this appeal.

7. The Appellant accepts that the principle of speciality has in this way been enshrined in Romanian law by statute. However, he asserts that the way in which the courts in Romania are interpreting that statute will result in his serving the whole of his sentence and serve to deny him of the protection to which he is entitled.

8. It is agreed that a court in this jurisdiction when considering whether speciality arrangements are in place must consider not simply whether the requesting state has

transposed the rule in statute but must also be "*satisfied that there are practical and effective arrangements in the requesting territory to ensure that speciality will not be infringed*": (*Mihaylov -v- Bulgaria [2022] EWHC 908 Admin at paras 18c*). It was further said at para 18d: "*what was important was that [the requesting state] had incorporated the speciality rule into their law; that there was no compelling evidence that the … authorities would act in breach of the rule; and that the requested person had a remedy in domestic law*"

9. It is for the requested person (i.e. the Appellant) to show on the balance of probabilities that appropriate speciality arrangements are not in place: see *Jan Kucera -v- The District Court of Karvina, Czech Republic [2008] EWHC 414 (Admin)*. There is a strong presumption that a Member State will act in accordance with its international obligations with respect to speciality and there is therefore a need for strong evidence to displace that presumption: see *Poland -v- Brodziak [2013] EWHC 3394 (Admin)* and *Mihaylov -v- Bulgaria (supra)*.

10. In seeking to displace this onerous duty, the Appellant relied at first instance on the evidence of Dr Mihai Mares, an advocate from Romania who was accepted as an expert in Romanian law. He produced three reports dated 11 September 2020, 22 January 2021, and 16 April 2021. He also gave oral evidence. The essence of his evidence was as follows:

    i) He explained how a Romanian court approached the issue of totality when sentencing a criminal for multiple offences (as set out above).

    ii) He accepted that the principle of speciality as set out in Article 27 of the Framework Decision had been adopted into Romanian law.

    iii) However, it was his conclusion that once a sentence has been passed and made final it cannot be disaggregated by a Romanian judge as it is then res judicata and that therefore any purported attempt by a judge to disaggregate it would be unlawful. There is, he said, in Article 598 of the Romanian Criminal Code a power to reopen sentences but only in particular circumstances which do not include where the issue is one of speciality. In those circumstances he doubted whether there existed an effective way of the obligation recognised and enshrined in Article 117 of Law 302/2004 being enforced.

    iv) He highlighted four cases in which courts in Romania have concluded that the issue of speciality does not arise at all in cases in which the offences for which extradition was not granted were considered by the court making the extradition order: one of those was a decision of the Romanian High Court of Cassation and Justice and the others later decisions of District Courts. He accepted that there is no doctrine of stare decisis in Romanian law obliging them to follow decisions of higher courts but posits the suggestion that there is evidence that judges in District Courts are being influenced in their approach to such cases by the decision in the High Court of Cassation and Justice: indeed in one instance the decision of the High Court was referred to in the judgment of the District Court.

    v) He also identified three cases in which courts in Romania had seen fit to disaggregate sentences in similar situations in which the Appellant now finds himself.

11. Dr Mares has given evidence of a similar nature in the past in *Enasoaie -v- Court of Bacau Romania [2021] EWHC 69 (Admin)*. His evidence on that occasion referred to the Romanian High Court decision. His first report in this case mirrored that provided to the court in *Enasoaie*. The only potentially relevant extra information made available in his second and third reports in this case which was not before the court in *Enasoaie* was that relating to the cases in which District Courts have reached similar conclusions to those of the High Court of Cassation and Justice. Ultimately in *Enasoaie* the appeal was allowed and extradition was refused on different grounds relating to dual criminality. However, the Court (Holroyde LJ and Swift J) went on to consider the very point being raised in this appeal, stating at para 64, "*We have hesitated before embarking upon what will be obiter dicta in relation to those further grounds of appeal. We have, however, been told that the issue of speciality in circumstances such as these has been the subject of different approaches in decisions at first instance and that assistance on that issue may therefore be welcomed*". The court then proceeded as follows:

> [65] The submission on behalf of Mr Enasoaie was that the resulting sentence cannot be disaggregated so as to avoid his serving any part of that sentence in respect of offences (vii), (viii) and (ix), which were said not to be extradition offences. The consequence of that submission, if correct, would seem to be that a Romanian offender who was subject to a resulting sentence imposed for multiple offences, not all of which were extradition offences, could not be returned to serve any part of his sentence because he could not be returned to serve all of it. That would lead to surprising results. It would mean, for example, that an offender who had been convicted of one offence could be returned to serve his sentence, but an offender who had convicted of multiple offences, all but one of which were extradition offences, could not be returned. It would mean that the principle of speciality, which protects a returned person against punishment for anything other than the offences in respect of which he has been extradited, would be used as a means to prevent his serving any sentence for his extradition offences.
>
> [66] It is unfortunate that the manner in which Romania deals with a resulting sentence, in circumstances where an offender has been extradited on some but not all of the offences covered by a warrant, did not emerge with immediate clarity from the further information initially provided by the JA. We understand why Mr Enasoiae attaches importance to the statements in FI 3 that Romanian law "does not provide for the possibility of the 'disaggregation' of sentences" and that "the final warrant issued as a result of the merger will not be able to be enforced". Those words must, however, be read in the context of the remainder of that part of FI 3, in particular its reference to avoiding a result which would be unfavourable to the defendant. When FI 3 is read as a whole, we understand it to mean (a) that a resulting sentence cannot be enforced against a defendant who has only been extradited for some of the offences; and (b) that it is not possible to disaggregate the resulting sentence so as to restore the original separate sentences if, cumulatively, they will lead to imprisonment for longer than the final sentence. Neither of those restrictions necessarily means that the Romanian courts are powerless to enforce the appropriate total sentence for the offences in respect of which a defendant has been extradited.
>
> [67] That understanding is strengthened by the later further information. FI 4 (see [27] above) confirms that the reason why the final sentence cannot be enforced in full is "due precisely to the application of the specialty principle". It goes on to describe the appeal procedures by which "the Court would be able to decide, to what extent, the punishments ordered against the convict, could actually be enforced". FI 5 (see [29] above) is to similar effect.
>
> [68] The further information demonstrates that Romania does have in place effective arrangements to comply with its international obligations as to speciality. Article 117 directly implements Article 27(2) of the Framework Directive, and Article 598 provides a remedy if there is an obstacle to enforcement of the resulting sentence. Whether there is

> such an obstacle will no doubt depend on the details of an individual case and the length of the sentences for individual offences which were taken into account in calculating the resulting sentence. The important point, however, is that the further information shows Romania to have complied with its international obligations as to speciality and to have put in place effective arrangements to implement the principle of speciality.
>
> [69] Mr Enasoiae has not been able to adduce any compelling evidence to the contrary. The reports of Dr Mares do not contain any clear evidence that Article 598 cannot be used as a means of ensuring that a returned person will only serve his sentence for the offence(s) for which he was extradited. Indeed, Dr Mares refers to a case in which Article 598 was used in that way. Other cases to which Mr Hall invited our attention do not in our view support his argument. The decision in Edutanu turned on the specific information provided in that case and does not in our view assist Mr Enasoaie in the circumstances of this case. We are not persuaded that there is any evidence of there being any real problem in practice in ensuring that the princip le of speciality is observed. Mr Hall realistically acknowledged that in order for his submissions to succeed, the court would have to be able to distinguish Brodziak. In our view, there is no basis on which we should do so. Although that case was concerned with Polish legislation, it is apparent from the passage which we have quoted at [47] above that the court saw no objection in principle to a sentence being enforced "only in so far as it relates to the offences for which the requested person has been extradited".
>
> [70] We are unable to accept the submission that the terms of FI 4 and FI 5 leave open the possibility that an appeal court in Romania might consider the matter pursuant to Article 598 but uphold the sentence in its entirety. There is in our view no compelling evidence that such a decision might be made in circumstances where exclusion of the sentences for any non-extradition offences should lead to a reduction in the resulting sentence. There is no compelling evidence that Romania, having put in place effective arrangements to implement the principle of speciality, will then abandon that principle.
>
> [71] For those reasons, if it had been necessary for us to decide this ground of appeal, we would have rejected it.

12. In his judgment in this case, District Judge Robinson summarised the written and oral evidence of Dr Mares and the submissions of counsel. He reviewed the relevant UK caselaw with particular emphasis on *Enasoaie.* He then concluded:

> [68] The court in Enasoaie was in receipt of near identical evidence from Dr Mares to that in the instant case. The only material not before the High Court is the information that in 2 subsequent cases lower courts in Romania have followed the approach taken by the HCCJ, but it was conceded that the principle of binding precedent does not operate in Romania and I do not consider that these examples amount to compelling evidence that Romania does not have in place effective arrangements to implement the principle of speciality. At least one directly relevant case has been located where an extradited persons specialty rights were applied within the Romanian legislative and procedural framework and Dr Mares did not rule out such an outcome in this case. The court in Enasoaie was aware of the HCCJ case. Whilst the comments in Enasoaie are obiter they were made very recently; by a senior constitution of the court; after consideration was given as to whether they should be made; specifically, in order to provide assistance to appropriate judges; and after the merits of the arguments were considered in detail. I am satisfied that it is appropriate to find in accordance with the assistance given".

13. The test that I must apply on appeal is that set out in s27(3) to "the Act". I can only allow the appeal if:

> "the appropriate judge ought to have decided a question before him at the extradition hearing differently; and (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge".

14. I look firstly to the approach taken by the District Judge. It cannot be faulted. He considered the evidence with obvious care and applied the caselaw appropriately.

15. Even so, the question for me is whether he was wrong to find as he did. In my judgment he was right to treat the case of *Enasoaie* as persuasive even if was not binding authority. Although obiter to the decision itself , the guidance as to speciality was only given after careful consideration as to whether it was appropriate to give it. It was then given with the express intention of assisting judges who might have to make decisions of this nature in the future. It was not given in a series of off-the-cuff remarks but rather after full argument by leading counsel had been heard and considered. The guidance was given by a strong constitution of the court and in the recent past. Moreover, it was given on evidence which was similar to that relied on by the Appellant in this case.

16. I next consider whether the case of *Enasoaie* should have been distinguished by the District Judge in the case in hand. In my judgment he was right not to do so for the reasons he gave – i.e. that the only new evidence available to him was that contained in the second and third reports of Dr Mares which concerned three decisions of District Courts. Those few examples fell well short of amounting to compelling evidence that Romania was not acting in accordance with its international obligations to ensure that the principle of speciality was properly enshrined in its laws. That is particularly so where the Appellant's own expert accepted that there were decisions going both ways and that therefore there was currently no unified approach by the Romanian courts as to how these cases should be decided. In a legal system which does not rely on precedent, the High Court case does not show that the court which deals with the Appellant will make the same decision. The necessary safeguard is enshrined in Romanian statute and the available evidence falls short of establishing that it will interpreted in a way which is inimical to the Appellant's rights. The limits on the duty of a Judge dealing with the issue of speciality on an a request for extradition were considered by Dyson LJ (as he then was) in *R (Hilali) -v- Westminster Magistrates Court [2010] 1 WLR 241 at para 40:*

> "The 2003 Act requires the appropriate judge to satisfy himself that none of the bars to extradition exist and that the person's extradition would be compatible with his Convention rights. One of the bars is that there are no specialty arrangements with the requesting state. Once so satisfied, he or she must make the extradition order. Subject to an appeal under the 2003 Act, the extradition order cannot be challenged. It may transpire that, upon his surrender, a person's Convention rights are violated; or that he is dealt with in a manner which amounts to a breach of the specialty rule. If that occurs, it does not necessarily show that the extradition order should not have been made. But even if it does, for the reasons that we have given, the 2003 Act does not empower the appropriate judge to do anything about it. It is an assumption of the Framework Decision and Part 1 of the 2003 Act that any breaches of this kind will be capable of being remedied in the courts of the requesting state and, if necessary, in the European Court of Human Rights (breach of Convention rights) or in the Court of Justice of the European Communities".

Where, as here, a state has made proper provision to ensure that the principle of speciality has been enacted into its laws and there is no evidence that the court system is systematically depriving those extradited to its territory of proper protection, the remedy for those who claim to be adversely affected by the way in which Romanian statute law is interpreted by Romanian courts is to be found in Romania or, if necessary, by recourse to the ECHR or the CJEU.

17. Therefore, I find that the District Judge was entitled to find as he did that Romania has specialty arrangements in place. The Appellant has not discharged the heavy burden of disproving that this was not the situation. The appeal is dismissed.