Neutral Citation Number: [2022] EWHC 3214 (Admin)

Case No: CO/3078/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2022

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE JAY

- -

Between:

MR A — **Applicant**

- and –

DEPUTY GENERAL PUBLIC PROSECUTOR OF THE LYON COURT OF APPEAL — **Respondent**

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- -

Hugo Keith KC and **Rachel Barnes KC** (instructed by **Sternberg Reed**) for the **Appellant**
Richard Evans (instructed by **CPS**) for the **Respondent**

Hearing date: 6 December 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. This is the judgment of the Court to which we have both contributed. It arises from Mr A's application to re-open his appeal against the order of District Judge Tan Ikram dated 30 July 2019 for his extradition to France. This court had dismissed Mr A's appeal against the order of the District Judge for reasons that were set out successively in two judgments: [2021] EWHC 2543 (Admin) and [2022] EWHC 841 (Admin). The first of these two judgments was dated 20 September 2021; the second was dated 8 April 2022. The judgments dealt with the appeal of Mr A and also of Mr Esmaili, whose case had been thought to raise similar issues. An anonymity order preventing the identification of Mr A is in place.

2. On 6 December 2022, at the end of the rolled-up hearing of Mr A's application to re-open his appeal, we announced our decision that the appeal should be re-opened and the appeal allowed for reasons to be set out in writing at a later date. We now set out our reasons and shall refer to Mr A as the Appellant.

The factual and procedural background

3. Our two earlier judgments set out the protracted and complicated history both before and since 7 August 2000, when the Appellant was arrested by the French Authorities near Lyon upon discovery of a substantial amount of cannabis resin in the lorry that he was driving. It is not necessary for us to repeat any of that history again here: we assume that anyone who is interested in the case will have access to the two judgments. The second judgment included consideration of the Appellant's medical history at [72] ff and concluded, on the basis of the information that was then available to the Court, that any real risk of a violation of the Appellant's Article 3 rights could be discounted.

The present application

4. By an application notice dated 26 July 2022, the Appellant applied for (a) an order prohibiting the NCA from effecting extradition until further order and (b) directions to fix a rolled up hearing of an application to reopen the appeal and, if the application to reopen were granted, to hear the reopened appeal. The application was supported by a witness statement from his solicitor, Mr Cooper, signed on 25 July 2022.

5. The Court had previously been provided with updated information about the Appellant's health, including information from a work colleague. The information had provided apparently compelling evidence of a serious deterioration in the Appellant's mental health leading to the formation of plans to end his life by drowning at Morecombe Bay on 13 June 2022 (from which he was dissuaded by the intervention of the police). As an immediate result of this information the Court adjourned its pronouncement of the result of the appeal until 1 July 2022. In the interim, the Appellant was admitted to hospital as a voluntary patient due to his presentation of suicidal ideation and deterioration in his mood. Various other professional interventions added to a worrying picture of mental instability in the face of the imminent pronouncement. We can summarise the current position shortly. Although his condition is currently stable, he is extremely fragile. He has struggled, and

continues to struggle, with moderate to severe depression and is under the care of his specialised secondary local mental health team. Earlier in the year his GP was "extremely worried" about him committing suicide. Although this risk has decreased "to a degree", a lot of the precipitants are "still in play and this is a big concern."

6. On 12 July 2022 Mr Cooper was informed by the solicitor for Mr Esmaili that the Rouen Court of Appeal Prosecutor had withdrawn the warrant in that case because Mr Esmaili was deemed to have served the entirety of his sentence. By dint of him being subject to bail with an electronically monitored curfew of between 4-6 hrs for a period in excess of the sentence for which extradition was sought under the EAW, the sentence was deemed by the Prosecutor to be served.

7. Mr Cooper first obtained confirmation from the Electronic Monitoring Service about the electronic monitoring of the Appellant's curfew. The terms, as recounted in his witness statement, were as follows:

> "The Applicant was admitted to bail pursuant to these extradition proceedings on 30th January 2018; his bail conditions included to live and sleep each night at his home address, an electronically monitored curfew between the hours of 10:30pm and 4am, reporting to Swinton police station every Monday, Wednesday and Friday, to be in possession of mobile phone 07826780627 24 hours a day and said phone must be charged and switched on, surrender of passport and identity card, not to obtain or be in possession of travel documents, not to go to any international travel hub, including international train station, and the deposit of a £10,000 pre-release security."

8. These conditions have been subject to brief periods of temporary relaxation (e.g. when he has been in hospital) until (on an unspecified date) the hours of curfew were reduced to 00.00 - 04.00 am and reporting to the police station was reduced to twice a week. Mr Cooper calculated that, as at the time he made his statement on 25 July 2022, the Appellant had been subject of the electronically monitored curfew for 1,521 days. He also calculated that the remaining sentence as set out in the EAW (3 years, 8 months and 22 days) would be approximately 1,360 days.

9. Urgent enquiries were made of M. Thibaut Kempf, the French lawyer who had provided expert evidence at an earlier stage in the proceedings during which his expertise to provide relevant evidence was not challenged. On 25 July 2022 M. Kempf provided a statement to Mr Cooper. Although framed as a formal statement of his opinion, it did not comply with the formalities for a conventional expert's report in English proceedings. However, his advice was unequivocal:

> "My understanding is that [the Appellant] has been on bail in the English extradition proceedings with an electronically monitored curfew, for approximately 5.5hrs per night, for 1,512 days.
>
> As a matter of French law, each of these days is to be treated as a whole day served of his French sentence. The Cour de Cassation Criminal Division made clear in its published decision of 17 March 2021 that this is the case even where the duration of

> curfew was less than 9 hours and would not, as a matter of English law, count as time served of a custodial sentence … .
>
> Accordingly, under French law, [the Appellant] has already served under 'house arrest' (the equivalent of an Assignation à residence sous surveillance électronique) a period greater than that of his remaining custodial sentence in France and so would be required to serve no more time.
>
> Nonetheless, if returned to France, [the Appellant] would be taken straight into custody on the basis of the EAW and on return there is no automatic hearing before a judge, …."

10. M. Kempf advised that a specific application for his release would have to be made to a Judge following the Appellant's return to France and that there was no procedural guarantee that the hearing would take place shortly after his imprisonment. In his experience, it was likely that such an application would not take place before September, after the judicial vacations had passed.

11. M. Kempf also provided a copy of the decision of the Cour de Cassation. We set out the relevant parts in more detail at [32] below. For the purposes of the present summary, it is sufficient to say that the decision on its face provides broad support for the proposition that days spent under a measure of restricted liberty in the United Kingdom should be treated as detention that count towards a sentence imposed by the French courts.

12. M. Kempf wrote to the Lyon Court of Appeal Prosecutor's office via email on 15, 19, 21 and 22 July 2022 inviting them to withdraw the EAW in the Appellant's case. He also attempted to contact them by telephone. In his email to the Prosecutor's office on 22 July 2022 M. Kempf expressly drew attention to the Appellant having served his sentence and that "the surrender of Mr [A] to the French authorities under these conditions would necessarily constitute a serious and disproportionate infringement of his rights, in particular with regard to article 8 of the European Convention on Human Rights". By 26 July 2022, the prosecutor had not responded either by email or otherwise.

13. Mr Cooper asked the CPS for assistance (i) in contacting the NCA to ask whether surrender could be put to the end of the permitted period to enable the Prosecutor to respond and (ii) in contacting the French Prosecutor to encourage them to respond. On 21 July 2022 the CPS agreed to the former request but not the latter, on the basis that the matter was out of their hands.

14. In the light of this evidence, this Court made an order on 26 July 2022 (a) prohibiting the NCA from effecting the Appellant's extradition until further order; (b) requiring the Appellant to file an serve a skeleton argument and any further evidence in support of his application to renew the appeal by 4.30 pm on Friday 29 July 2022; (c) requiring the Respondent to file and serve a skeleton argument and any evidence in response by 4.30 pm on Friday 11 August 2022; and (d) directing that the application to reopen the appeal and, if that application was granted, the appeal itself was to be heard on the first available date, which proved to be 6 December 2022.

15. Pursuant to the Court's order, the Appellant submitted his skeleton argument on 29 July 2022.

16. On 10 August 2022, the Respondent provided its response to the application, signed by Counsel, and accompanied by a letter dated 4 August 2022 from the Deputy State Prosecutor acting on behalf of the State Prosecutor at the Lyon Court of Appeal to the Manager of the CPS Extradition Unit. The letter described M. Kempf's interpretation of the judgment of the Cour de Cassation as "very personal" and continued:

> "In the aforementioned judgment, the Criminal Chamber of the Court of Cassation admittedly agreed that an electronic surveillance measure in the UNITED KINGDOM could be offset against the prison sentence to be served in FRANCE by a convicted person subject to a European arrest warrant, but this can only be decided by the court which delivered the sentence, seized by the person concerned with an appeal on the grounds of difficulty of execution, the ruling being made after a full hearing of all parties and a rigorous examination of the material conditions of the house arrest abroad, in view of official documents from the judicial authorities of the state of the place of execution of the electronic monitoring measure.
>
> The 4th Chamber of the LYON Court of Appeal being solely competent to assess whether the time of electronic surveillance in the UNITED KINGDOM can be deducted from the 4 years' imprisonment sentence, the Public Prosecutor's Office at the said court does not intend to withdraw its European Arrest Warrant issued against Mr [A]. The European Arrest warrant will be maintained until the actual surrender of Mr [A] to FRANCE by the UNITED KINGDOM or any other sovereign State."

17. It will immediately be noted that, although it describes M. Kempf's interpretation of the decision of the Cour de Cassation as "very personal", the letter does not assert that he is wrong in his interpretation or advice; nor does it provide any information about the criteria that would be applied by the Lyon Court of Appeal in determining the question; nor, specifically, does it give any indication of what the attitude of the Lyon Court of Appeal would be to the information in its possession, namely that the Appellant been subject to 5.5 hours of curfew and other restrictions for 1,512 days. Put shortly, the response placed all the eggs in one basket, namely that the French Court was "solely competent to assess" whether the time should be deducted from the outstanding period of the Appellant's prison sentence as recorded in the EAW.

18. Mr Cooper continued to try to obtain evidence to support the Appellant's contention that he has served his sentence. It is not necessary to document all the steps he has taken. It is sufficient to record that he has been diligent in his attempts to obtain relevant fresh evidence and that his attempts led to three further applications to adduce additional fresh evidence, one being made on 1 December and a further two on 2 December 2022. Each of these applications was supported by further witness statements from Mr Cooper evidencing the steps he had taken and the fruits of his efforts or, in the case of the last application, a witness statement from a French lawyer,

M. Etienne Arnaud. We accepted and read the applications *de bene esse* in our preparation for the hearing.

19. It is convenient to aggregate the contents of the applications rather than to treat them separately. We summarise the material as follows:

i) Mr Cooper attempted on and after 1 November 2022 to obtain assistance in the form of information about similar cases from (a) Mr Esmaili (via his solicitor), who did not respond; (b) Fair Trials Abroad, who advised on 1 November that they could not assist; (c) the International Extradition Group, who had not responded by 1 December; and (d) Crimeline Assist Extradition Hub, who had not responded by 1 December;

ii) On 23 November 2022 Mr Cooper requested the CPS to give disclosure of the number of EAWs issued by France for which the warrants had been withdrawn due to time served subject to an electronically monitored curfew. The CPS declined to provide the requested disclosure. The CPS suggested that Mr Cooper approach Mr Esmaili's solicitor and were told that this had already been done;

iii) On 25 November 2022 Mr Cooper emailed a firm of solicitors, whose name he had found alongside an article on Doughty Street Chambers' website concerning a similar case. They responded by providing the ruling of District Judge Zani in the case before the Westminster Magistrates' Court of the Deputy Public Prosecutor in Rennes, *France v Daniel Peci* (19 April 2022). The District Judge recorded (at [72]) that counsel for the IJA "acknowledged that the French authorities have agreed that [Mr Peci] will be given credit for the entire period that he has abided by his curfew imposed as part of his bail conditions." The court was informed that this was initially an 8 hour curfew period per day, later reduced to 6 hours.

iv) The ruling of DJ Zani mentioned another case, which apparently raised similar issues, identified only as *France v Miller*. Mr Cooper discovered from the Westminster Magistrate's Court that Mr Miller had been discharged by District Judge Zani. Mr Cooper then asked the CPS to provide him with a copy of the ruling. On 29 November 2022 the CPS informed him that there had been no formal adjudication on the application as Mr Miller had served the equivalent sentence by being subject to an electronically monitored curfew whilst awaiting extradition and that there was no judgment in existence;

v) Mr Cooper identified that Mr Miller was represented by Mrs Karen Todner of GSC Law. On 30 November 2022 she provided him with a witness statement identifying 9 clients she had represented. She said that "all of the above clients … were given their time on tag in the UK as part of their sentence";

vi) Mrs Todner informed Mr Cooper that the length of Mr Miller's curfew varied during the case but that, by the end, it was four hours, from midnight to 4 am. She provided the report of a French Lawyer in the Miller proceedings (M. Philippe Pejoine) dated 5 February 2020, which, under a statement of truth, said "Under French law, the time served on tag is equivalent to a custody or a remand measure and does actually count <u>in full</u> against any custodial sentence";

vii) Mrs Todner identified a Mr Varey as someone who had served the whole of his sentence “on tag”. She provided the order of the Administrative Court dated 13 May 2022 in the case of *Frank Varey v Rennes Court of Appeal (France)* quashing the order for the extradition of Mr Varey because the EAW had been “fully withdrawn as the appellant has served the entirety of his sentence.”;

20. The statement of M. Arnaud does not comply with the normal English formalities for expert evidence but does include a declaration of truth. He states that he is a lawyer qualified in France who specialises in criminal and extradition law and who has previously provided expert evidence to English lawyers in extradition proceedings where the EAW has been issued in France. After setting out Articles 142-11 and 716-4 of the French Criminal Procedure Code, he states as his opinion:

> “These provisions mean that under French law, days spent by a person on an electronically monitored curfew as one of their conditions of bail during extradition proceedings relating to a French prison sentence, will be counted as days served of that sentence. For these purposes there is no required minimum period of the daily curfew.”

21. Nothing further was received from the Respondent between 10 August 2022 and 4.39 pm on the day before the hearing, when the Respondent provided a further Skeleton Argument which was much more detailed than its previous response but maintained the position that only the Court of Appeal in Lyon was competent to consider the question whether and to what extent the Appellant's time spent on curfew should be counted against its sentence.

The submissions of the parties

22. The central submission on behalf of the Appellant is that the question whether time spent on curfew in England should count towards the Appellant’s sentence is a question of French law which, from the perspective of the English Court, is a question of fact. While recognising that ultimately only the Court of Appeal in Lyon would be competent to rule on the application of that French law to the Appellant’s case, it is submitted on his behalf that the English Court has a free standing obligation not to act in a manner that infringes the Appellant’s Article 5 or Article 8 rights, and that to commit him to custody and to return him to custody in France when his sentence has been served in full would be a breach of those rights and/or, as a residual jurisdiction, would be an abuse of process. On his behalf, Mr Keith KC submits that the English court cannot duck the question of French law which has been raised as a question of fact on this application; and that the evidence adduced by the Appellant is uncontradicted and supports a finding on the balance of probabilities that his days on curfew in England should, as a matter of French law, count towards his sentence. On that basis, he has served his outstanding sentence, specified in the EAW as being 1,360 days, by being on curfew in England for 1,690 days (1,521 plus an extra 129 days to 1 December 2022), which is comfortably in excess of 1,360 days.

23. The central and sole substantive submission from the Respondent is that only the Court of Appeal in Lyon is competent to rule on the questions raised by the Appellant. As a preliminary point of distinction, the Respondent submits that no regard should be had to the other cases that the Appellant has identified because they were cases where the

IJA accepted that the sentence had been served and that the EAW should be withdrawn: that is not this case since there is no agreement and no withdrawal.

24. In support of that central submission, the Respondent takes nine points, of which the last was effectively abandoned during the hearing. First, the Respondent does not accept that time spent on an electronically monitored curfew will necessarily be credited to an outstanding sentence: this is essentially a restatement of its central contention that only the Court in Lyon can decide the issue. Second, it submits that comments from a judicial authority should be taken at face value, as a reflection of the principle of mutual trust and confidence. Third, where there is a question of law in a requesting state, it is submitted that "it is not for the Court of the requested state to become involved in the analysis." Fourth, "it is not, in any event, for the Court [of the requested state] to determine whether sufficient time has been served … except in the most unusual circumstances." Fifth, it is submitted that the Appellant's evidence is not unequivocal such as to lead to an irresistible conclusion that he would be entitled to immediate release. Sixth, the Respondent repeats its submission that reference to other cases does not assist. Seventh, it is submitted that it is unnecessary to re-open the appeal in order to avoid real injustice since, at worst, his detention would be short-lived and not arbitrary and he is "stable medically speaking". Eighth, it is submitted that the circumstances are not exceptional.

The legal framework

25. Pursuant to Crim PR r.50.27 it is necessary for the Appellant to give reasons why (i) it is necessary for the court to reopen its decision in order to avoid real injustice, (ii) the circumstances are exceptional and make it appropriate to reopen the decision, and (iii) there is no alternative effective remedy.

26. It is not necessary to set out the terms of Articles 5 and 8 ECHR. It is sufficient to recite that the abuse of doctrine is a residual doctrine.

The Framework Decision, the French Code of Criminal Procedure and the Cour de Cassation decision

27. The Appellant founds his submission on Article 26 of the Framework Decision and Articles 142-11 and 716-4 of the French Code of Criminal Procedure.

28. Article 26 of the Framework Decision provides:

> "*Article 26*
>
> **Deduction of the period of detention served in the executing Member State**
>
> 1. The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed.

> 2. To that end, all information concerning the duration of the detention of the requested person on the basis of the European arrest warrant shall be transmitted by the executing judicial authority or the central authority designated under Article 7 to the issuing judicial authority at the time of the surrender."

29. We have two translations of the relevant Articles of the French Code of Criminal Procedure, which appear to us to carry the same meaning. We adopt the translation provided by M Arnaud in his statement.

30. Article 142-11 provides:

> "An electronically monitored house arrest is assimilated to pre-trial detention for the purpose of counting its deduction from a custodial sentence, in accordance with Article 716-4."

31. Article 716-4 provides:

> "Where there has been a pre-trial detention at any stage of the proceedings, such detention shall be deducted in full from the length of the sentence to be imposed or, where appropriate, from the total length of the sentence to be served after conviction. The same shall apply in the case of pre-trial detention ordered in the context of proceedings for the same acts as those which gave rise to the conviction, if these proceedings were subsequently annulled.
>
> The provisions of the preceding paragraph shall also apply to deprivation of liberty undergone in execution of a warrant for bringing in or arresting a person, to imprisonment undergone outside France in execution of a European arrest warrant or on the request for extradition.
>
> Where there has been pre-trial detention at any stage of the proceedings, this detention shall also be deducted in full from the duration of the security period to which the sentence is attached, where applicable, notwithstanding the simultaneous execution of other prison sentences."

32. The decision of the Cour de Cassation Criminal Division (Cass. Crim 17 March 2021 No. 20-84365), on which the Appellant relies, arose from an appeal lodged by the public prosecutor at the Paris Court of Appeal against the judgment of that Court. The facts as recorded in the judgment were that two subjects were arrested in the United Kingdom in February 2018 in execution of EAWs issued by the examining magistrate in Paris. They were held in pre-trial detention from 26 February to 20 March 2018, and from that date until their surrender to the French authorities on 23 May 2019 they were each subject to bail with an electronically monitored curfew. They lodged applications seeking a reduction in their sentence of imprisonment remaining to be served under the sentence pronounced in France for the period from 26 February 2018 to 23 May 2019, during which they were subject to the measures restricting their liberty in the United Kingdom. The Paris Correctional Court allowed their claim and decided that the period

should be deducted from the remaining prison term. The public prosecutor appealed. The Cour de Cassation rejected the appeal, holding as follows:

> "8. In order to hold that the period from 29 March 2018 to 23 May 2019 undergone by the applicants in the United Kingdom, under the 'electronically monitored curfew' regime, should be deducted in its entirety from the prison sentences imposed on them, the judgment under appeal notes from the judgment of the Court of Justice of 28 July 2016 in Case C-294/16 PPU JZ that it follows from the wording, context and purpose of Article 26(1) of Framework Decision 2002/584 that the concept of 'detention' within the meaning of that provision, refers to a measure which is not restrictive but deprives a person of liberty, and which does not necessarily take into account the fact that a person has been detained for a period of time, it follows from the wording, context and purpose of article 26(1) of framework decision 2002/584 that the concept of 'detention', within the meaning of that provision, refers not to a restrictive but to a custodial measure, which does not necessarily take the form of a situation of confinement, and that is appropriate to examine the measures at issue, to determine whether, by reason of its type, duration, effects and manner of execution, it is of such a degree of intensity as to deprive the person concerned of his liberty in a manner comparable to imprisonment.
>
> 9. The judges noted that after a period of detention from 26 February to 29 March 2018, i.e. thirty-two days, the defendants were released on bail with a curfew imposed on their place of residence from 10 p.m. to 5 a.m. the following day, and controlled in a way that did not allow them to leave the country. In addition to a ban on going to certain places and a daily check-in at the police station, they are also subject to electronic surveillance.
>
> 10. They added that the latter had to wear a constant surveillance device in the form of an electronic bracelet on their leg which could not be removed and that their telephone had to be switched on at all times.
>
> 11. They consider that even if this measure is not deducted, in English law, from the sentence of imprisonment pronounced, since the curfew is only imposed for a daily period of less than 9 hours, it should be assimilated, in French law, to a measure of house arrest under the terms of the law. They recall that article 142-11 of the French code of criminal procedure provides that house arrest with electronic surveillance is assimilated to pre-trial detention for the purposes of the law. The Court of Appeal has held that the duration of the sentence is not to be integrated with that of a custodial sentence and that Article 716-4 of the Code, to which it refers, does not distinguish according to the duration of the sentence that the pre-trial detention measure is

> carried out in France or that it is imposed in the form of provisional incarceration, in execution of a European arrest warrant, where it provides for this deduction[1].
>
> 12. By thus assessing, after an adversarial debate, the circumstances of the case in the light of the information produced, in particular by the authorities of the executing State, concerning the details of the measures imposed in Great Britain on the applicants from 29 March 2018 to 23 May 2019, and by considering, The Court of Cassation also found, on grounds that were not insufficient or contradictory, that the resulting situation for the applicants should be treated as electronically monitored house arrest, the duration of which is deductible from that of the prison sentence imposed, in accordance with the conditions of Article 142-11 of the Code of Criminal Procedure. The Court of Appeal justified its decision without incurring the alleged grievances, in accordance with Article 142-11 of the Code of Criminal Procedure."

The English authorities

33. Turning to the English authorities, the Respondent's contention is that this Court simply should not entertain the question whether the Appellant has served his sentence. In support of its position, the Respondent relies upon the observation of Cavanagh J in *Lazo v Government of the United States of America* [2022] EWHC 1438 (Admin), [2022] 1 WLR 4673 that "the starting point in extradition cases, both Part 1 and Part 2 cases, is that unless the contrary is established, things said and done by the requesting state are to be taken at face value and are to be trusted." That principle is not in doubt: but it has no relevant applicability here. What was in issue in *Lazo* was whether the standard arrest warrant provided by the requesting state was valid. In that factual context the presentation of the warrant as part of the package of documents upon which the requesting state relied was a sufficient assertion of validity, unless the contrary was proved. In the present case, the Respondent has said nothing about whether or not, under French law, the Appellant has served his sentence. All it has done is to assert that the Appeal Court in Lyon (and no-one else) should decide the issue.

34. The issue raised by the Respondent is not novel. In *Newman v Poland* [2012] EWCA 2931 (Admin) the Court (Pitchford LJ, Foskett J) said at [19]-[20]:

> "19. It is realistically conceded by Miss Tyler, on behalf of the respondent, that it would be an abuse of the process of this court and the court below to continue to seek the extradition of a person who has, in effect, served his custodial sentence in full, as a result of the application of Article 26 , solely for the purpose of enabling the management decision for the discharge of the appellant to be taken in Poland. Secondly it is conceded that it would be a disproportionate interference with the appellant's

[1] The translation is unclear at this point: but the gist we understand to be that Article 716-4 does not distinguish between whether the pre-trial detention takes place (a) in France or (b) elsewhere in execution of an EAW. In either event, time is deducted.

> right to a private and/or family life under Article 8 to extradite the appellant for the same purpose. … . … [I]t would, in our judgment, be an abuse of the process of this court if the requesting state continues to seek extradition knowing, in consequence of information given under Article 26.1, that the sentence has been served.
>
> 20. The passage of time since District Judge Zani's decision in March 2012 inevitably means that the ground now argued on behalf of the appellant could not have succeeded before him. In our judgment, Section 27 (2) and (4) of the 2003 Act apply to the present situation. This court may allow the appeal because evidence is now available which was not available at the time of the extradition hearing in the court below. Had the appellant served his Polish sentence in full by the date of the extradition hearing, for the purposes of Article 26, we have no doubt that the district judge would have discharged him since to have returned him to Poland would have constituted an unjustified interference with his Article 8 rights. On this ground we would allow the appeal."

35. In *Marosan v Court of Cluj-Napoca, Romania* [2021] EWHC 3078 (Admin). [2022] 1 WLR 1759 at [22]-[23] the Court analysed whether the English court was entitled to consider the question of deductibility of time spent on bail and whether considering the question would involve trespassing on an issue which it is the exclusive province of the requesting state to decide. Fordham J concluded that it would not involve trespassing and that the English court, in appropriate circumstances, had an independent obligation to consider the question. In the absence of a clear statement from the Romanian authorities of a legal or policy position he considered the evidence before him and held that it would be disproportionate to return the appellant in that case: see [24]. To similar effect, Ouseley J in *R(oao) Danielius v Lithuania* [2014] 4 WLUK 721, relying on *Newman v Poland* held that it would be an abuse of process and disproportionate to extradite an individual if his or her sentence had been served. See also *Jesionowski v Poland* [2014] EWHC 319 (Admin) per Wilkie J.

36. By way of cautionary note, the Court has more than once said that, where a short period of sentence remains to be served, surrender would not be disproportionate for that reason alone. See, for example, *Molik v Poland* [2020] EWHC 2836 (Admin) at [11]: "the Court considering Article 8 proportionality must, in principle, respect the time left to be served and which is required, by the requesting state authorities, to be served there: … ."

37. *Kloska v Poland* [2011] EWHC 1647 (Admin), upon which the Respondent relies, was a case where, on the requested person's case, there was still a short time left for him to serve in relation to the sentence that was imposed by the Polish courts: see [21]. The court held that, on the requested person's best case, there would be a further nine months of a total sentence of three years, six months to serve: see [27]. It was in that context that the Court said at [27], in a passage on which the Respondent relies:

> "… [E]xcept in most unusual circumstances, it cannot be for the courts in England to form a view on whether the person to be

> extradited has or has not served enough of his sentence that was imposed by the requesting judicial authority."

This is, in our judgment, a reflection of the caution advised by the court in *Molik*. It is not a blanket exclusion that is applicable in a case such as the present, where there is no reasoned opposition to the evidence on which the Appellant relies.

38. The Respondent relies upon *Troka v Albania* [2021] EWHC 3424 (Admin) to support its submission that, where there is a question as to the interpretation of law in a requesting state, it is not for the Court in the requested state to become involved in the analysis. *Troka* was a case where the issue in question was the proper application of Italian limitation periods. Having reviewed the relevant authorities, Fordham J said at [18]:

> "What those cases emphasise is that the Court will not become embroiled with disputed questions as to the application, under the requesting state's law, of limitation periods; such questions being for the courts of the requesting state to determine; at least unless the position is very clear cut."

39. It is apparent from *Troka* and the cases there cited that limitation is treated as being a matter of exceptional complexity and sensitivity, sufficient to justify extreme caution on the part of the English court. However, even in relation to limitation, Fordham J allowed the possibility of the English court becoming involved if the position is very clear cut. In our judgment this is a necessary proviso because of the English court's obligation not to act in such a way as to cause a disproportionate interference with the relevant ECHR rights of a person whose extradition is being sought. Furthermore, whereas here there is no evidence from the Respondent about the criteria to be applied or how the French court would or might resolve the issue, it can hardly be said that the English court is liable to become "embroiled with disputed questions". In our judgment it is axiomatic that the English court has a primary obligation to satisfy itself that the Appellant's rights will not be subject to disproportionate interference if it were to order his extradition.

40. On the basis of these authorities, we reject the Respondent's contention that it is not properly open to this court to consider the question whether the Appellant has served his sentence. None of the authorities to which we have been referred suggest or require a blanket exclusion of the question when it is directly relevant and necessary for the English court to consider in order to guard against it breaching its primary obligations to a person who is subject to an extradition request. We can see no good reason in principle or authority for adopting such an extreme approach.

41. We accept without reservation that the Court should tread very warily where what is suggested is that an appellant still has (or may still have) a period of his sentence left to run; but, on the information that is available to us, that is not this case – we are concerned with the assertion that the Appellant has served the full term of his sentence as a result of the time he has spent under electronically monitored curfew and the other restrictions that we have summarised above. We also accept without reservation that, had the Respondent provided us with material information that went to undermine the case that the Appellant seeks to run, that information should and would have been given the close attention and respect that flows from the obligation of mutual trust

underpinning the extradition arrangements; but there is no such information here either as to the proper interpretation of French law, or the criteria that the French court would apply or how such criteria would affect the outcome of any determination of the length of sentence that the Appellant has served. That has remained the case despite considerable evidence being provided to the Respondent about the terms of the Appellant's bail, including restrictions of movement over and above the period of electronic curfew: see [7] and [9] above. Further information could have been requested if what had been provided was thought to be insufficient: but it was not. The Respondent has simply contended that the English court should not entertain the question whether the Appellant had served his sentence.

Discussion and conclusions

42. In the present case, Mr Evans, who appeared for the Respondent, accepted that if, contrary to his submissions, we were to entertain the question whether the Appellant had served his sentence and were to conclude that he had, it would be wrong for this Court to order that he be extradited to France. In our judgment that concession is well-founded and properly made.

Fresh evidence

43. The question then arises whether we should admit the fresh evidence upon which the Appellant wishes to rely and which, up to this point, we have read *de bene esse*. We are satisfied that the criteria for admission of the fresh evidence are fully satisfied. The possibility of relying upon time spent on remand did not arise at the time of the District Judge's decision in the present case. Had it done so and had the issue been raised, we are confident that the District Judge should and would have reached a decision such as that indicated in [20] of *Newman v Poland*, as set out above. It has not been suggested by the Respondent that the evidence should be excluded because it was not presented earlier and, as we have said, as soon as he was alerted to the point by Mr Esmaili's solicitor, Mr Cooper pursued it with diligence.

44. We reject the Respondent's submission that the evidence is not unequivocal. It includes the evidence of three French lawyers, M. Kempf, M. Pejoine and M. Arnaud, each of which is unequivocal in its terms. The combined effect of their evidence might have been diluted if the Respondent had provided *any* evidence either to contradict their expressions of opinion or to explain the criteria that the French court would apply so as to lead to a contrary conclusion. Had such evidence been provided by the Respondent, it would have been treated with the respect that is attributable as a result of the mutual trust and confidence that exists in the context of extradition arrangements.

45. We accept that the reports of the three French lawyers do not comply with the normal formalities for the giving of opinion evidence to an English Court, and that they do not provide a worked analysis concentrating upon the specific fact and degree of the Appellant's terms. These features go to weight and, if there were any material contradiction of their opinion about how the French court would react, are features that might tip the balance between opposing opinions. But in the absence of any reasoned opposition, there is no sound basis for rejecting their opinions, either singly or cumulatively.

46. While we accept that the facts of the various cases about which Mr Cooper acquired evidence are different, it may be noted that the package of measures to which the Appellant was subject in England bears some comparison with the facts of the Cour de Cassation decision: in addition to the electronic monitoring of the curfew, the Appellant had to surrender his passport and identify card, was forbidden to obtain travel documents and was not to go to any international travel hub, including any international train station. The duration of his nightly curfew was initially 5 ½ hours, which bears comparison with the facts of Mr Esmaili's case (4-6 hours), and the cases of Mr Peci (6 hours) and Mr Miller (4 hours). Therefore, though comparison with the facts of other cases would not on its own have been sufficient, the exercise provides some support for the opinions expressed by the three French lawyers. We therefore reject the Respondent's submission that no regard at all should be had to the facts of other cases. It may also be noted that, as Mr Keith submitted in reply, the CPS has been aware of the reasons why the EAWs have been withdrawn in the other cases but, on behalf of the Respondent, has chosen neither to engage with those reasons nor to give disclosure in relation to those or other similar cases – the evidence of Mrs Todner providing strong support for an inference that there are others of which the CPS would be aware.

47. For these reasons, we concluded that the evidence should be admitted.

Reopening the appeal

48. Much of the reasoning that we have set out sets the scene for our decision to reopen and then allow the appeal. As will be apparent from what we have said already, we accept that it would be a disproportionate breach of the Appellant's Article 8 rights for him to be committed to custody when he has already served his sentence. We are not impressed by the Respondent's submission that, at worst, his period in custody would only last until the French court ordered his release, for two main reasons. First, *any* period served after he has in fact served his sentence is an unconscionable outcome; and, second, on the information that is available to this court, there can be no certainty about the period that would elapse before his eventual release.

49. The evidence that we have admitted is all one way and is to the effect that the Appellant has served his sentence. On that basis, Mr Evans rightly conceded that it would be wrong to order his return to France: see [42] above. That is the conclusion that we would have reached in any event in the circumstances of this case, which, for the avoidance of any doubt, we regard as exceptional. Although, as we have said, the issue is not novel, it is exceptional for a requested person to be able to show that he has in fact served the sentence in respect of which his extradition is requested. Where, as here, the evidence is all one way and is unequivocal in supporting the submission that he has served his sentence, it would in our judgment be a disproportionate interference with the Appellant's Article 8 rights to order his extradition. Had it been necessary to rely upon the residual jurisdiction founded on abuse of process, we would have reached the same conclusion by that route.