Neutral Citation Number: [2021] EWHC 3287 (Admin)

Case No: CO/615/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

3rd December 2021

Before:

MR JUSTICE FORDHAM

- -

Between :

MATE KONCZOS	**Appellant**
- and –	
LAW COURT IN GYOR (HUNGARY)	**Respondent**

- -

- -

Myles Grandison (instructed by Dalton Holmes Gray Solicitors) for the **Appellant**
Amanda Bostock (instructed by Crown Prosecution Service) for the **Respondent**

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Hearing date: 16/11/21

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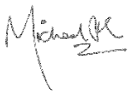
Approved Judgment

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.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This extradition appeal raises questions concerning the application of the phrase "the person deliberately absented himself from his trial" in section 20(3) of the Extradition Act 2003 ("the 2003 Act"). As Swift J observed, when granting permission to appeal on the section 20 ground of appeal, those questions arise "in unusual circumstances". As DJ McGarva ("the Judge") said when ordering extradition: "This is an unusual case because in fact [the Appellant] has exercised his right to a retrial since the original European Arrest Warrant was discharged in 2016". The Appellant also maintains Article 8 ECHR and abuse of process grounds of appeal. Swift J refused permission to appeal on those additional grounds, which Dove J subsequently directed be listed on a rolled-up basis together with the section 20 ground. The mode of hearing was in-person.

2. The Appellant is aged 36 and is wanted for extradition to Hungary. That is in conjunction with a conviction European Arrest Warrant (EAW2) issued on 27 May 2016 and certified by the NCA on 24 July 2019. The index offending is said to have taken place between March 2007 and May 2009. It is described as swindling and forgery, in the fraudulent operation of a business for car sales and leases. The Appellant came to the United Kingdom in 2009. He was tried in his absence in Hungary in 2014, for the index offending, and was convicted ("the 2014 Conviction"), being sentenced to 3 years 6 months custody. It is that 3 years 6 months custody to which EAW2 relates. Extradition on EAW2 was ordered by the Judge on 18 February 2021 after an oral hearing on 14 January 2021. The Judge was satisfied as to Article 3 ECHR compatibility, by reason of a prison assurance which the Respondent had provided in September 2020. Article 3 ECHR is not relied on as a ground of appeal, though it and the position regarding the timing of the prison assurance feature in the argument. It was common ground that the Appellant had "probably been unaware" of the proceedings which led to the 2014 Conviction, and the Judge accepted that the Appellant had not "deliberately absented himself from his trial" so far as the 2014 Conviction was concerned. The Judge also accepted that the Appellant no longer had an automatic future entitlement to a retrial in Hungary, as he had done when EAW2 was issued. The Judge held that extradition was not incompatible with section 20, nor with Article 8, nor an abuse of process.

3. The Appellant had been discharged in previous extradition proceedings. A previous conviction EAW (EAW1) had been issued on 15 January 2015, relating to the same index offending and the same conviction and sentence as were later to become the subject of EAW2. There were also at that earlier time two accusation EAWs in relation to other matters. The Appellant had been arrested on EAW1 and had come before the Westminster magistrates' court. It had been established by the decision of the Divisional Court in in GS v Hungary [2016] EWHC 64 (Admin) [2016] 4 WLR 33 (21 January 2016) that a specific prison assurance (in relation to both pre-conviction remand and post-conviction custody) was needed in Hungarian extradition cases. The Appellant was discharged on EAW1 by DJ Grant (16.5.16) after an oral hearing (5.5.16), because the Respondent had failed to comply with directions to provide the required prison assurance, a direction made most recently at the oral hearing (5.5.16).

4. Eleven days after the discharge of the Appellant on EAW1 (and on the two accusation EAWs) by DJ Grant (16.5.16), the Respondent issued EAW2 (27.5.16). The Metropolitan Police Service ("MPS") promptly made the Appellant aware of EAW2.

EAW2 was not certified until more than three years later (24.7.19) and the Appellant was not arrested on EAW2 until a further year had passed (17.6.20) when he was released on bail. The GS prison assurance followed (29.9.20) and the oral hearing was scheduled (14.1.21). The reason why EAW2 was not being executed during the period after May 2016 is given in an email dated a year later (2.5.17) written to the Appellant's Hungarian lawyer (Dr Csire) by the MPS officer dealing with case ("the MPS Email"). It said this:

> ***I was … informed that [the Appellant] had been in contact with solicitors and the courts in Hungary and that it was agreed to re-open his conviction case … and that a court date had been set for April 2017. [The Appellant] was continually making contact with me, expressing his wish to return to Hungary to have the case heard and in order not to delay this, [EAW2] was not executed as this could have delayed the process by months if he did not consent to his extradition.***

5. EAW1 had recorded that the Appellant had a guaranteed entitlement to a future retrial in Hungary, should he request this following any surrender. After discharge of EAW1, but having been told about EAW2, the Appellant decided to pursue the possibility of retrial in Hungary. He instructed Dr Csire to act for him in that endeavour. On the Appellant's behalf, Dr Csire made two requests in July 2016. The first July 2016 request was the Appellant's request for a retrial. This was approved by the Hungarian courts on 12 September 2016. Trial dates were set and there were summonses for the Appellant's attendance: a summons on 7 February 2017 to attend trial on 25 April 2017; a summons on 9 October 2017 to attend trial on 21 November 2017; and ultimately a summons on 23 November 2017 to attend trial on 23 January 2018 ("the 2018 Retrial Hearing"). The second July 2016 request was a request for the suspension of the domestic Hungarian sentence of 3 years 6 months from the 2014 Conviction, and with it the suspension of EAW2. This second request was refused by a ruling of the Hungarian courts on 26 January 2017. This was on the basis that the domestic Hungarian sentence remained extant, unless and until set aside on a successful retrial. That ruling was upheld on appeal on 17 March 2017. What followed was described by the Appellant – in the proof of evidence (3.8.20) which he adopted in evidence at the hearing before the Judge – as "a deadlock" where "I would not be able to travel for fear of being arrested". The relevant domestic Hungarian law (known as section 409(3)) provided for the retrial to be "terminated" without consideration of the evidence – and the guaranteed right of retrial extinguished for the future – if the defendant in the retrial had 'left for an unknown place'. The position taken by Dr Csire on the Appellant's behalf, set out in a communication to the Hungarian court (13.6.17), was that the Appellant was "unable to leave England voluntarily". That contention relied on the MPS Email (itself forwarded to the Hungarian court) which described the Appellant as "unable to travel as he would have been arrested at any border that he crossed and placed into custody, delaying the case further". Dr Csire was able to give the Hungarian court a known UK address for the Appellant. At the 2018 Retrial Hearing (23.1.18) the Hungarian court was unimpressed by Dr Csire's contention that, because "the arrest warrant issued in connection with the final sentence was still in effect", the Appellant's "freedom of movement extended up to the border of the United Kingdom, and he could not leave voluntarily". The Hungarian court reminded itself of its earlier rulings (26.1.17 and 17.3.17), refusing the Appellant's second July 2016 request to suspend the Hungarian sentence. It reminded itself of the various summonses. It terminated the retrial proceedings ("the 2018 Termination"), pursuant to section 409(3), on the following basis:

> ***In the view of the court the [Appellant] does not acknowledge the court's decision taken with regard to suspending the sentence. It was the [Appellant] himself who caused and persisted in maintaining the situation which had developed. The [Appellant] clearly does not want to return***

> ***to th[is] country in a manner whereby the arrest warrant is valid concerning the relevant sentence. It is the [Appellant] himself who is obstructing the proceedings … The situation related – and attributable – to [the Appellant] is as if he had gone to somewhere unknown. For retrial proceedings requested by the [Appellant] it is not sufficient for the place of residence to be known, as the [Appellant] has not attended the trial as a result of the reasons referred to and he does not accept the court's decisions, therefore the court, pursuant to the mandatory provision of … Section 409 paragraph (3), has terminated the retrial proceedings.***

The 2018 Termination was challenged by Dr Csire but it was upheld and maintained by subsequent rulings: 6 June 2018; 27 April 2019 and 13 June 2019. The Hungarian courts did not accept Dr Csire's submission that the termination had been unlawful in Hungarian law, because a known UK address could not be treated as equivalent to having 'gone to somewhere unknown'. The guaranteed right of retrial was extinguished for the future. The retrial court did not conduct a hearing on the evidence and merits (which I will call "an EMH") and Dr Csire did not get to make the Appellant's defence before it.

6. In all these circumstances, when the case came before the Judge: (a) the Appellant had not "deliberately absented himself from his trial" so far as the 2014 Conviction was concerned; and (b) in light of the 2018 Termination the Appellant now had no guaranteed future entitlement to a retrial (a guaranteed entitlement which had been recorded in EAW2 when issued in May 2016). It was against that backcloth that the issue arose as to whether extradition of the Appellant would be compatible with section 20 (which I will describe as his s.20 'extraditability'). The analysis before the Judge focused on two key questions: (i) whether the 2018 Retrial Hearing could constitute the relevant 'part of the trial process' given the absence of an EMH; and, if so (ii) whether in the circumstances the Appellant had been "deliberately absent" from the 2018 Retrial Hearing. The Judge, who heard live evidence from the Appellant (in-person) and from Dr Csire (by telephone link), answered these questions as follows (see §17 below): (i) "yes", because there 'would have been' an EMH if the Appellant had attended; and (ii) "yes", because the Appellant had 'chosen' not to return to Hungary to attend. If the Judge was "wrong" on either (or both) of those key questions, the section 20 ground of appeal will succeed.

Introducing section 20

Key provisions

7. I will set out the two key provisions here. Section 20 of the 2003 Act provides as follows:

> ***Case where person has been convicted. (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence. (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21. (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial. (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21. (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial. (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21. (7) If the judge decides that question in the negative he must order the person's discharge. (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights – (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required; (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.***

8. It was common ground that it remains necessary – at least in the present case – to interpret section 20 in conformity with Article 4a of the EU Framework Decision 2002/584/JHA (as amended), as explained in Cretu v Romania [2016] EWHC 353 (Admin) [2016] 1 WLR 3344 at §§14-19. Article 4a provides as follows:

> ***Decisions rendered following a trial at which the person did not appear in person. (1) The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State: (a) in due time: (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and (ii) was informed that a decision may be handed down if he or she does not appear for the trial; or (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or (c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: (i) expressly stated that he or she does not contest the decision; or (ii) did not request a retrial or appeal within the applicable time frame; or (d) was not personally served with the decision but: (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant. (2) In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal. (3) In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.***

An encapsulation

9. Both Counsel accepted that the factual context in the present case, in which section 20 falls to be applied, is a special set of circumstances. Neither Counsel had been able to uncover any decided case which was concerned with those circumstances. With that in mind, it is I think a good discipline to try and encapsulate the idea which is reflected in section 20, read with Article 4a. The encapsulation is mine.

> ***Section 20 encapsulated. The idea is that an extraditable requested person who has been convicted by the criminal courts of the requesting state must – in the past determination of guilt or innocence – have enjoyed (or must have relevantly foregone) the twin rights, either by the person's own presence and participation, or by the presence and participation of a legal***

> ***representative: (i) to have their defence heard; and (ii) to have the relevant evidence (for and against them) evaluated. If not, the extraditable requested person must alternatively now have a demonstrated future entitlement allowing those twin rights to be enjoyed (if not relevantly foregone).***

Some key points

10. The following key points relating to section 20 are I think worth emphasising. (1) Features, such as 'deliberate absence', which make the requested person extraditable in accordance with section 20 must be proved by the requesting state to the criminal standard (see Cretu at §34v). (2) The requesting state may be able to establish that the requested person is extraditable for the purposes of section 20 either (i) because the twin rights have been enjoyed (or relevantly foregone) in the past or (ii) because the twin rights are guaranteed to be enjoyed (if not relevantly foregone) in the future. (3) In a case where the twin rights have not been enjoyed (or relevantly foregone) at the time when an EAW is issued, the question will necessarily focus on whether they are enjoyed (if not relevantly foregone) in the time period after the EAW is issued. (4) The past (or alternatively future) twin rights which section 20 guarantees can be achieved through the presence and participation of a legal representative, in the absence of the requested person (Art 4a(1)(b); s.20(8)(a)). (5) The past (or alternatively future) twin rights which section 20 guarantees are entitlements on the part of the requested person, but they can be relevantly foregone by the requested person. An example of relevantly foregoing the twin rights, to which there was a past entitlement, is 'deliberate absence' on the part of the requested person (s.20(3)). But another obvious example is where the requested person pleaded guilty. There is no duty on the convicting court of the requesting state to have conducted an EMH if the requested person pleaded guilty and was convicted on the basis of that guilty plea. Examples of past action which constitutes relevantly foregoing the twin rights as a future entitlement would be if the requested person has already been duly notified of a retrial right but "expressly stated that he or she does not contest the decision" or "did not request a retrial or appeal within the applicable time frame" (Art 4a(1)(c)). Examples of future action which constitutes relevantly foregoing the twin rights as a future entitlement would be if, after extradition and surrender, the requested person were duly notified but did not request retrial or appeal or did not do so within the applicable time frame (Art 4a(1)(d)). It follows from all of this that the twin rights with which section 20 is concerned can be 'contingent' on action – past or present – by the requested person. It can, in such situations, suffice that the requested person 'would have had' the twin rights, but the person acts so as relevantly to forego them.

Interrelationship between s.20 and Art 3 (prison assurances)

11. There is an interrelationship between section 20 and Article 3 prison assurances. Two relevant things can, in my judgment, be said with confidence. First, where the requested person's section 20 extraditability depends on a demonstrated future entitlement allowing the twin rights to be enjoyed (if not relevantly foregone) by them post-extradition, Article 3 ECHR will be engaged in relation to extraditability and the prison conditions in which the requested person stands to be detained on 'remand' while awaiting a future-requested retrial (this being detention to which reference is made in Article 4a(3)). That is so, even if those remand prison conditions would be avoided by the requested person 'choosing' to forego the retrial right. The point can be tested in this way. Take a scenario involving the following features: conditions in the prison facilities of the requesting state in which convicted persons are detained are such as not to require any prison assurance, in order

for extradition to serve a prison sentence to be compatible with Article 3; the 'remand' facilities of the requesting state in which a person is detained while awaiting trial (or retrial), on the other hand, are such as to require a prison assurance for extradition to face detention on 'remand' to be Article 3-compatible; if the requested person were facing an accusation EAW and stood to be detained post-extradition in those remand facilities, pending trial, extradition would not be ordered in the absence of an assurance, because that extradition would be incompatible with Article 3; the requested person is not section 20-extraditable by reference to the past enjoyment (or the past foregoing) of the twin rights, but only by reference to the future entitlement to those twin rights; if the requested person's future entitlement to the twin rights were enjoyed (rather than foregone) post-extradition, the requested person would be detained while awaiting retrial in the 'remand' facilities; no prison assurance has been given; the requesting person will be able to avoid being in a remand facility, post-extradition, by 'choosing' the option of foregoing the right to the retrial, and by simply serving their existing sentence as a convicted person. The question is whether, applying Article 3 (alongside section 20), extradition would be ordered in this first scenario which I have just described. When I put this sort of scenario to Counsel, each of them accepted that extradition would not be ordered in such a case and I was shown no authority indicating the contrary. I think that must be right. The UK extraditing court would insist on a prison assurance applicable to the position while exercising the future entitlement to the twin rights guaranteed by section 20. The UK extraditing court would not order extradition without such an assurance, as being incompatible with Article 3 ECHR as applicable in the light of the section 20 analysis. The requested person would not, in this scenario, face the invidious choice between the future retrial right and Article 3 safeguarding.

12. Secondly, where the requested person's section 20 extraditability depends on a demonstrated past entitlement allowing the twin rights to have been enjoyed (if not relevantly foregone), Article 3 ECHR will not be engaged in relation to extraditability and prison conditions in which the requested person would have stood to be detained while awaiting a past trial from which they were deliberately absent (section 20(3)) or from a past retrial of which they were notified but did not request (Article 4a(1)(c)). That would be so even if their 'choice' to forego their past trial (or retrial) twin rights was made in order to avoid remand or prison conditions which would require a prison assurance if they were being extradited for trial or because of a guaranteed retrial right. The point can be tested in this way. Suppose a scenario involving these features: the 'remand' facilities of the requesting state in which a person is detained while awaiting trial would require a prison assurance for extradition to be Article 3-compatible; if the requested person were facing an accusation EAW and stood to be detained post-extradition in those 'remand' facilities pending trial, extradition would not be ordered in the absence of an assurance, that extradition being incompatible with Article 3; the requested person is facing extradition on a conviction EAW; the requested person is said to be section 20-extraditable by reference to the past foregoing of the twin rights (deliberate absence from trial), which occurred at a time, prior to any EAW, when they were in the territory of the requesting state; the requested person argues that they cannot be treated as having 'relevantly foregone' those past twin rights (being 'deliberately' absent), because of the 'remand' conditions which they would have stood to have faced had they exercised those twin rights. The question is whether, applying section 20 (alongside Article 3), extradition would be ordered in this second scenario which I have just described. When I put this sort of scenario to Counsel, they each accepted that extradition would be ordered in such a case, and I was again shown no authority

indicating the contrary. Indeed, as part of her arguments, Ms Bostock positively relies on this answer to this scenario. Again, I think that must be right. Article 3 ECHR precludes extradition to face the prospect of post-extradition detention incompatible with Article 3 standards in a country from which a prison assurance is recognised as needed, in the absence of that assurance. Article 3 does not, however, entitle every requested person who absconded to avoid detention in that country to a ruling that they were not "deliberately absent" from their trial (or retrial), about which they were well aware but which they did not attend because they feared detention. The same would apply to conditions applicable on imprisonment and deliberate absence to avoid serving a prison sentence. The UK extraditing court would not rely on the absence of something (whatever it be) akin to a prison assurance – applicable to the individual in the context of their past trial (or retrial) – as a prerequisite to treating their absence as "deliberate". Article 3 and the absence of Article 3 "assurances" does not infuse the section 20 question of whether pre-extradition absence from a trial (or retrial) was "deliberate". That would be a significant extension. It would stand to mean that there could never be past 'deliberate absence' in cases involving certain requesting states. Article 3 and prison assurances have not been applied by the Courts in that way.

Section 20 and post-EAW retrial

13. One question which arises in the present case is this. Can a requested person, in principle, become section 20-extraditable as a consequence of a choice made by them, to exercise an entitlement to a retrial, which takes effect during the period after the issuing of an EAW, after they have come to the UK and when they know they are facing the prospect of extradition? A choice of that kind was made by the Appellant in the present case. It is that choice which gives rise to the contours of this case recognised to make this case an "unusual" section 20 case (§1 above). Ms Bostock and Mr Grandison agree that the answer to the "in principle" question which I have just posed is "yes". Mr Grandison accepts that if the 2018 Retrial Hearing had involved an EMH with the twin rights exercised by Dr Csire, the Appellant would be section 20 extraditable even if the outcome of that hearing were adverse to him and extinguished his guaranteed entitlement to any further and future retrial post-extradition. Ms Bostock says that – as the Judge found - the Appellant has become section 20 extraditable, having relevantly foregone his twin rights through being deliberately absent at the 2018 Retrial Hearing. I will need to come back to all of that. But, for now, I record that I agree with both Counsel that the answer to the "in principle" question is "yes". A post-EAW choice to invoke a right of retrial can render a requested person extraditable for the purposes of section 20. I mention at this point that Mr Grandison drew my attention to the case of Rexha v Italy (No.2) [2012] EWHC 3397 (Admin). In that case it had been held by the High Court here (on 17.5.12) that the requested person was section 20-extraditable because of a demonstrated future entitlement to the twin rights. The requested person then applied here for a certified point of law of general public importance which was refused (6.10.12). In the meantime, he made an application (18.8.12) to the Italian court to have his conviction set aside, which was refused (6.10.12). He then relied on that development to argue that he had no future entitlement to the twin rights, so that the development serve to undermine the High Court's conclusion. The vehicle for that argument was an application to reopen the extradition appeal, on the grounds that it was now clear that removal was incompatible with section 20 (§25). His application was refused. The Court concluded that the application to the Italian court (18.8.12) had been misleading and so the Italian court's response to it did not undermine the conclusion previously arrived at here (17.5.12). The

Court also said that if the requested person had wanted to make an application to the Italian court during the extradition proceedings, he could and should have done so far earlier. In my judgment, Rexha has only very tangential relevance, illustrating (at most) that a requested person who is the subject of an EAW may choose to take voluntary action which may impact on the section 20 analysis.

14. I emphasise that, just because a requested person may become section 20-extraditable by reason of a "choice" to exercise an entitlement to a retrial in the period after the issuing of an EAW, knowing that they are facing extradition, it does not follow that a requesting state can impose invidious 'choices' on a requested person facing extradition. In the case of De Zorzi v France [2019] EWHC 2062 (Admin) [2019] 1 WLR 6249 the Court concluded that the requested person had not become a "fugitive" by reason of declining to choose to go back to the requesting state and answer to proceedings there. The Court emphasised (at §59) that she was not to be treated as "required" to "surrender herself" in that way, which "amounted to abandoning her resistance to extradition". One question which I raised with Counsel arose in the following scenario. Suppose that a requesting state has issued an EAW against a requested person. Suppose also that that requesting state cannot show that the requested person is section 20-extraditable by reference to any past enjoyment (or relevant foregoing) of the twin rights. One such situation would be where there had been a past conviction in absence, but it was not 'deliberate absence'. Now suppose that the EAW has been issued and the requested person is in the UK. The question I asked about that scenario was this. Could the requesting state in those circumstances confer on the requested person a time-limited, present entitlement to a retrial, at the same time imposing a condition that the requested person return to the requesting state for the retrial, and then rely on the requested person's failure to do so as extinguishing the entitlement to the retrial? Would the requested person become section 20 extraditable by the 'choice' not to return for the retrial? Or would section 20 extraditability require a post-surrender guaranteed future entitlement to a retrial? In response, Mr Grandison submitted that the requested person would not become extraditable by the action of not returning for the retrial. Ms Bostock declined to make a submission on that situation, on the basis that 'that is not this case'. In the present case, she says, the Appellant exercised a choice to pursue the retrial right in July 2016; he could have 'sat tight' and retained his future entitlement to the twin rights, were he extradited. I respect Ms Bostock's wish not to be drawn into answering a hypothetical scenario. It is important to say that nothing which I say in this judgment should lend any support to the contention that the requested person would become extraditable in the scenario which I have just described. I strongly incline to the view that Mr Grandison is right about this scenario. I would be extremely surprised if a requesting state could act in the way that I have described, and render the requested person extraditable by reference to section 20. There would be a clear dissonance with De Zorzi. It is striking that in Article 4a the requesting state is described either as needing to point in the EAW to a retrial right enjoyed (or foregone) prior to the issue of the EAW (Article 4a(1)(c)) or one to be enjoyed (or foregone) "after the surrender" (Article 4a(1)(d)). There is in Article 4a no intermediate position entitling the requesting state to rely on a retrial right imposed in the period in between. The consequence would be that the requested person (previously tried in absence without 'deliberate absence') could be placed in the invidious position of being "required" to "surrender herself" in a way which "amounted to abandoning her resistance to extradition", or lose the right of retrial. That would be a surprising position for a requesting state to be able to engineer. But, as Ms Bostock points out, that is not this case.

Section 20 and the present case

What the parties could have done

15. As I have indicated, this is a case in which each party makes powerful submissions in relation to section 20, based on what the other party could have done, but did not do. Ms Bostock for the Respondent – as I have mentioned – says that the Appellant could have 'sat tight' and resisted extradition on EAW2. He chose instead to invoke the right to seek a retrial in Hungary, alongside which he made his request for the Hungarian custodial sentence, and EAW2, to be suspended pending that retrial. If he had chosen to 'sit tight': he would have retained his future entitlement to the twin rights following any extradition; there would have been no question of any arrest or detention in Hungary other than following the provision of a GS prison assurance; he would also be able to rely on the other protections which arise under extradition law and procedure, including "speciality". He chose to go 'outside' the extradition process. He did so with legal representation. He must accept the consequences.

16. Mr Grandison, for the Appellant, says that the Respondent could have addressed the GS need for a prison assurance, at any time including when DJ Grant directed it to provide such an assurance and when DJ Grant later (16.5.16) discharged the Appellant on EAW1 because none had been provided. It could have acted so that there was protection in place for the 2018 Retrial Hearing (23.1.18), instead of which it waited 4½ years until September 2020 to provide a prison assurance. He says there are two further things which the Hungarian judicial authorities could have done, in relation to the Appellant's section 20-extraditability, but which it did not do. The first is that the Hungarian court could at the 2018 Retrial Hearing have allowed Dr Csire to exercise the twin rights of making the Appellant's defence and having the evidence evaluated, so that the Appellant "was indeed defended by that counsellor at the trial" (Article 4a(1)(b)). The second is that the Respondent could have restored the demonstrated future entitlement to a retrial, post-extradition, a step which it could have taken at any time after 2018 Retrial Hearing, or for that matter at any time after the Appellant's arrest on EAW2 (17.6.20). The Respondent secured none of these things. It must accept the consequences.

The Judge's two key conclusions

17. The Judge arrived at two key conclusions (see §6 above), on the basis of which he held that the Appellant was extraditable for the purposes of section 20. (1) First, he held that the 2018 Retrial Hearing (on 23.1.18) constituted the relevant part of the "trial", because it afforded the Appellant the *contingent* entitlement to an EMH, provided that he were physically present at the hearing in Hungary. The Judge referred to the hearing as "the retrial which had he been present would have been a rehearing where he would have the chance to challenge witnesses … [and] was represented by the lawyer of his choice"; and "would have been a retrial had he attended"; the "hearing did not proceed to a challenge of the evidence because of his non-attendance"; "the rehearing was part of the trial process, it was a chance to revisit the whole of the trial had he attended". (2) Secondly, the Judge held that the Appellant was voluntarily absent, and "deliberately absent" from the 2018 Retrial Hearing. That was because it was "his choice" that he "did not attend the retrial". Albeit that this was "because he did not want to go to prison and start serving the sentence imposed in his absence", in circumstances where there was "the absence of a prison assurance, and the refusal of the judicial authority to withdraw the European Arrest warrant and suspend the execution of the sentence". But these features did not

"compel" his absence (it was "not compelled"). Rather, the Appellant "exercised his right to a retrial" and "did have an unfettered right to a retrial". So, although the Judge could "perhaps understand the decision not to attend the rehearing", "that was a choice the [Appellant] made": "he chose of his own will not to attend".

The section 20 ground of appeal

No EMH

18. With that detailed introduction to section 20, I turn to the analysis of the section 20 ground of appeal in the present case. Pursuant to the permission to appeal granted by Swift J, Mr Grandison advances four points in support of his contention that the Judge was wrong. The first point which is advanced seeks to impugn the Judge's first conclusion (§17(1) above). The point is made by reference to a statement of principle in the case of Tupikas Case C-270/17PPU [2017] 4 WLR 188, where the Luxembourg Court said this at §81:

> ***… in the event that proceedings have taken place at several instances which have given rise to successive decisions, at least one of which was given in absentia, it is appropriate to understand by 'trial resulting in the decision', within the meaning of Article 4a(1) of the Framework Decision 2002/584, the instance which led to the last of those decisions, provided that the court at issue made a final ruling on the guilt of the person concerned and imposed a penalty on him, such as a custodial sentence, following an assessment, in fact and in law, of the incriminating and exculpatory evidence, including, where appropriate, the taking account of the individual situation of the person concerned.***

Mr Grandison argues, in essence, as follows: The 2018 Retrial Hearing was the last of the line of relevant decisions, following the 2014 Conviction which took place in absentia. It was capable of being the "trial resulting in the decision", but only if there were an EMH. The proviso identified by the Luxembourg court in the passage set out above ("provided that the court at issue") is essential. The question of 'deliberate absence' is nothing to the point. Even if the Appellant were 'deliberately absent', the Hungarian court was nevertheless obliged to evaluate the evidence, by making "an assessment, in fact and in law". The Hungarian court could have done so. It could have allowed Dr Csire to exercise the twin rights on the Appellant's behalf: to have his defence heard and the evidence evaluated. It did not do so. Given that the future guarantee has been lost, the absence of an EMH is fatal to the Appellant's extraditability pursuant to section 20.

19. In my judgment, the flaw in this argument is that it loses sight of the *contingent* nature (see §10(5) above) of the twin rights and the role played by deliberate absence, especially in the context of retrial. The proviso described in Tupikas is not absolute. It applies only to the situation where the retrial right has not been 'relevantly foregone' by the requested person's actions. To take a simple example, where the requested person has in the past been convicted in absence but has subsequently been notified of a right of retrial (Article 4a(1)(c)), section 20 extraditability can be secured by a right to a retrial which is contingent on the requested person having taken action: if that person does not request the retrial, or does not do so within the prescribed period, section 20 is satisfied by the *contingent* right to the EMH. It is satisfied by the entitlement: by what 'could' and 'would' have happened. That demonstrates – at least in the case of a retrial – that the court in the requesting state need not go on to convene and conduct an EMH, where the requested person's own action in default means the EMH has been relevantly foregone.

A classic scenario where a right *is* relevantly foregone is where there was 'deliberate absence' on the part of the requested person (section 20(3)). Unless "deliberately absent" from the 2018 Retrial Hearing, the Appellant is not extraditable pursuant to the language, structure and purpose of section 20. But if "deliberately absent", his section 20-extraditability does not turn on whether the Hungarian court conducted an EMH. That is because, if "deliberately absent", his twin rights were relevantly foregone, pursuant to that language, structure and purpose. It is true that the Hungarian court could still have conducted an EMH, allowing Dr Csire to exercise the twin rights on the Appellant's behalf. But it was a matter for the interpretation and application of Hungarian domestic law whether it did so. So far as Hungarian law (section 409(3)) is concerned, that course was not required where, having summonsed him to attend the hearing, the Appellant was at an "unknown place"; nor (determined the Hungarian courts) if the Appellant was in the same position "as if he had gone to somewhere unknown". Whatever the position in domestic Hungarian law, an EMH was not required in order to meet the requirements of section 20 or Article 4a, if the Appellant was "deliberately absent". It follows that the Judge's first conclusion (§17(1) above) involved no error.

Impossible to leave the UK

20. Mr Grandison's second, third and fourth points seek to impugn the Judge's second conclusion (§17(2) above). The second point, in essence, was this. The Judge was wrong on the evidence before him in failing to appreciate, and to find, that the Appellant's absence from the 2018 Retrial Hearing was because the Appellant was physically prevented from leaving the UK, by reason of the extant EAW2. This was what the MPS Email was saying when it explained that he was "unable to travel as [he] would have been arrested at any border that he crossed and placed into custody, delaying the case further". The reference to an arrest "delaying the case further" must have been a reference to arrest in the UK, since it was an arrest in the UK which would lead to the Appellant being brought before an extradition judge, leading to delay. An arrest in Hungary would be in conjunction with the domestic Hungarian warrant of imprisonment, and the MPS was in no position to say that such an arrest would involve "delaying" the retrial in Hungary. The position was communicated by Dr Csire's response (13.6.17) to the then Hungarian summons requiring the Appellant's attendance at the retrial hearing. In that response, Dr Csire said the Appellant was "unable to leave England voluntarily": the word "leave" was a description of being 'stuck in the United Kingdom'. That is because the effect of EAW2 – as an extant EAW – would be a 'red-flag' if, for example, the Appellant tried to board a flight at Heathrow to Budapest, intent on attending his retrial there. If the true position on the evidence is that the Appellant believed himself 'stuck in the UK' and unable to leave the UK – unable to board a flight at Heathrow for Budapest – then the finding that he was 'deliberately absent' (s.20(3)) from the 2018 Retrial Hearing was an unsustainable finding; a point fortified by remembering the Respondent's burden of proof and the criminal standard of proof (see §10(1) above). It follows that the Judge's second conclusion (§17(2) above) was wrong and the Appellant was, and is, not extraditable by reference to section 20.

21. I cannot accept this argument. The Judge made a finding of fact on this aspect of the case. He did so, applying the criminal standard of proof. He said this:

> ***Having considered all the evidence both oral and written I am satisfied beyond reasonable doubt as to the following facts … [The Appellant] was entitled to a retrial in Hungarian law and his application was granted but then terminated because he did not attend the trial. He did not attend***

> ***the retrial because he did not want to go to prison and start serving the sentence imposed in his absence …***

This was a finding of fact that the Appellant's reason for not attending the retrial was because he feared being arrested in Hungary. That was where he would be "serving the sentence". This was a finding arrived at having considered the written evidence and the oral evidence, from the Appellant and also from Dr Csire. As the Judge explained, attending the hearing "would mean him starting to serve the sentence". The Judge did not accept that the extant EAW2 served to preclude (compel) the non-attendance. The Judge said: "the refusal of the judicial authority to withdraw [EAW2] and suspend the execution of the sentence did not compel him not to attend". There is, in my judgment, no basis for this Court interfering with this finding of fact or reaching a different one. The Appellant's proof of evidence had said: "the Hungarian authorities refused to withdraw [EAW2], meaning that I would be arrested as soon as I crossed a border". The Judge recorded that, in cross-examination, the Appellant had referred to the MPS Email which said "he should not go back because he would be arrested which would delay the process", continuing: "He was concerned that he would be dragged off the plane and made to start to serve a sentence imposed in his absence, when he had not known about the trial and where his rights to be held in humane conditions would be violated". The Judge also recorded this as the submission made on behalf of the Appellant: "The requested person contends that … he should not be considered voluntarily absent at the retrial because he was compelled not to attend because the EAW was not withdrawn and the judicial authority refused to suspend the operation of his sentence pending the hearing which meant he would have had to start serving his sentence …" All of these fit with the finding of fact made by the Judge. The Judge had and considered the materials which recorded the first request of July 2016 (for the retrial) as having been accompanied by the second request. That second request was for suspension of the Hungarian sentence. That was refused (26.1.17 and 17.3.17). That refusal was what Dr Csire continued to maintain with the Hungarian courts – on the Appellant's behalf – prevented the Appellant from travelling to Hungary and attending the retrial. Those matters also fit with the Judge's finding. There is also this problem. The MPS Email was written on 2 May 2017 and the MPS was deliberately deferring arresting the Appellant on EAW2 (27.5.16) because of his wish to pursue his retrial in Hungary. However, as Ms Bostock points out, there is no evidence of any attempt to ask the MPS to take steps to ensure that the authorities at a port of exit (such as Heathrow airport) did not impede travel to Hungary, as the requesting state, based on any 'red-flag'. The Appellant was able to point the UK authorities to a series of summonses from the Hungarian courts, requiring his attendance at the retrial. He also had a full two months between the final summons (23.11.17) and the 2018 Retrial Hearing (23.1.18) to which that summons related. There was no attempt to take steps to be able to leave the UK. There was no attempt to leave. The contemporaneous documents powerfully attest to the Appellant's dominant concern as being that he wished a 'clean slate' in the sense that the sentence pursuant to the 2014 Conviction was suspended pending the retrial hearing. Had the Appellant been told that he could leave Heathrow on a plane to Budapest, it is very clear that he would not have done so, while he faced arrest on his arrival in Hungary. That was the fear he described when cross-examined. In all these circumstances, there is no basis whatsoever for this Court overturning a finding of fact made by the front-line extradition judge having heard oral evidence, or coming to the conclusion on the evidence that the Appellant did not attend the 2018 Retrial Hearing because he thought he would be physically prevented from getting on a plane at Heathrow.

No "specialty" protection

22. Although Mr Grandison left this until last, it is convenient to deal with this point next. The essence of the point was as follows. Mr Grandison says that, had the Appellant travelled to Hungary for the 2018 Retrial Hearing, he would have foregone the "specialty" protection which applies to a person who is surrendered, in accordance with a court order, following extradition proceedings before an extradition judge. Mr Grandison made the same submission to the Judge: that the Appellant would have been "without the protection of 'speciality'". 'Specialty' is a shield which protects an extradited person from being tried in Hungary, post-surrender, for prior criminal matters other than those which have been explicitly raised with the UK extraditing judge. Mr Grandison cited XC Case C-195/20 PPU (24 September 2020) where the Luxembourg Court (at §39) described specialty protection in terms of the conferral of "a right". Mr Grandison's argument is that an individual cannot be treated as having "deliberately absented" themselves from a post-EAW retrial hearing, where attending the hearing would mean giving up on protections available in extradition proceedings, and in particular "specialty" protection. It follows, he says, that the Judge's second conclusion (§17(2) above) was wrong and the Appellant was and is not extraditable by reference to section 20.

23. In my judgment, there are two answers to this point. First, the Appellant chose to request retrial knowing about EAW2, instead of waiting for extradition proceedings to take their course. He was not required to make that choice. He could have 'sat tight'. He made his choice with the assistance of legal representation. He was duly summonsed to attend that retrial hearing. Attending the hearing would have followed on from the choice which he made. Refusing to do so was "deliberate". Secondly, the Appellant through Dr Csire repeatedly told the Hungarian courts that he would have returned to Hungary to attend his retrial – as he was summonsed to do – if the Hungarian sentence imposed after the 2014 Conviction was suspended pending the retrial. That was the second July 2016 request, which accompanied the first one (the request for the retrial). That is inconsistent with the suggestion that the absence of "specialty" protection was why he did not attend the retrial. There was no question of 'temporary return' under some special protective arrangement: whether akin to the section 21B "temporary surrender" seen in some accusation EAW cases proceedings; or whether akin to the "Iron Letter" informal arrangement, to which both Counsel made reference in their oral submissions. Arrangements of those kinds may serve to keep intact extradition safeguards including "specialty" protection. On the evidence, no similar arrangement was ever sought, or mentioned. The Appellant and Dr Csire clearly contemplated that the Appellant would return to Hungary for the retrial, if only the Hungarian sentence were suspended pending the retrial hearing. That position is wholly inconsistent with any suggestion that there was an involuntariness arising from the absence of "specialty" protection. The Judge rejected the suggestion that there was, and he was plainly right on the evidence to do so.

No prison assurance

24. Mr Grandison's final point, in essence, is this. It is wrong in law to characterise as "deliberate" and "voluntary" the Appellant's absence from the 2018 Retrial Hearing, in circumstances where: (i) it had been established in earlier proceedings in the same case (DJ Grant, 16.5.16) that – absent a prison assurance – there were substantial grounds for believing that the Appellant would face detention in contravention of Article 3 standards; and (ii) no prison assurance had yet been given. The Appellant's act of declining to return

to Hungary ,in the absence of a prison assurance, was plainly entirely justifiable. Since this Court would not extradite the Appellant to Hungary without an assurance, this Court cannot expect him to return there voluntarily without such an assurance. It follows that this Court cannot characterise as "deliberate" his refusal to do so. The principle expressed by Maurice Kay LJ in Atkinson v Cyprus [2009] EWHC 1579 (Admin) [2010] 1 WLR 570 at §41 is applicable:

> … ***whether a person has deliberately absented himself from the trial or part of it … is a question of fact. It calls for consideration of what was in his mind. Generally, a conscious decision not to attend will amount to deliberate absence, although I accept the possibility … that there may be a case in which a conscious decision is so affected by an absence of free will that it should not be classed as 'deliberate'.***

What is in play, moreover, is the absolute human right standard of Article 3 ECHR: the right not to be subjected to inhuman and degrading treatment. This is not a question of replicating the entirety of the safeguards – such as "specialty" – which apply to extradition proceedings. Rather, this is about expecting of an individual action which would run counter to their fundamental and most basic, absolute, human rights. To find the Appellant deliberately absent is unconscionable. It follows, says Mr Grandison, that the Judge's second conclusion (§17(2) above) was wrong and the Appellant was and is not extraditable by reference to section 20.

25. This is a powerful line of argument, which undoubtedly gives rise to cause for careful reflection. But I cannot accept it. The starting point is, as I have emphasised above, that the Appellant chose to request the retrial in Hungary. He did so knowing about EAW2, knowing about his earlier discharge from EAW1 and its basis, and knowing that there was still no prison assurance. He also did so knowing that a prison assurance would inevitably be necessary in any extradition proceedings on EAW2. There is strong evidence that he wanted a 'clean slate' enabling him to be at liberty in Hungary in the run up to the retrial. That was the point of the second July 2016 request: for suspension of the extant Hungarian sentence pursuant to the 2014 Conviction, pending the outcome of the retrial. There is some evidence that part of his desire to be at liberty pending the retrial related to fears about prison conditions. He referred in cross-examination to being "made to start to serve a sentence imposed in his absence … where his rights to be held in humane conditions would be violated". And the submission was made on his behalf that the Hungarian courts' refusal to "suspend the operation of his sentence pending the rehearing … meant he would have had to start serving his sentence without the benefit of a prison assurance". The Judge found as a fact that his reason for not attending the retrial was "because he did not want to go to prison and start serving the sentence imposed in his absence". However, the evidence in the case – including that described by the Judge from the live evidence at the hearing – does not, in my judgment, support the conclusion that the absence of a prison assurance was so overbearing as to negative the Appellant's free will. The Judge's finding was that the choice, although "difficult", was one "freely made". That finding is, in my judgment, unimpeachable. But there is a further key feature of the case, which powerfully undermines the argument being advanced. It is this. The Appellant's evidence is that he was willing to go to Hungary and attend his retrial *if* the Hungarian authorities were prepared to suspend the operation of his sentence pending the rehearing. The documents bear that position out. It is what Dr Csire was repeatedly telling the Hungarian courts was the Appellant's position. But the logic of this was that the Appellant was accepting that he *could* be required to serve his original custodial sentence – and in any event he *could* be required to serve a newly-imposed custodial

sentence – *if he failed at the retrial*. For either of those, there would be no suspension. And for either of those, *there would be no prison assurance*. The Appellant was prepared, voluntarily, to return to Hungary to attempt to clear his name at his retrial, without any prison assurance which would apply if he were convicted at that retrial. He was prepared to do that, even though he knew he would inevitably have had such a prison assurance, if there were extradition proceedings and he were surrendered, with his right of retrial. Linked to this is the fact that there is no evidence that at any stage the Appellant or his legal representatives ever raised, with the UK authorities or with the Hungarian authorities, the question of some arrangement said to serve as a parallel with assurances given to courts in extradition proceedings. It is, in my judgment, impossible on the evidence to conclude that the absence of a prison assurance had an 'overbearing' effect on the Appellant's 'free will'. Assurances are required by UK extraditing courts in order to guarantee compliance with the UK's Article 3 obligations. As I explained earlier (see §12 above), Article 3 would not operate to exclude from characterising as "deliberate" an absence from any trial or retrial, in the case of a country from whom UK extraditing courts require prison assurances. Nor does Article 3 mean that a person who – knowing that there is an EAW issued against them and no prison assurance – cannot act "deliberately" when they are absent from a right of retrial which they and their legal representatives have chosen to request. Still less does that follow in a case where, as here, the person who had made that choice was requesting a suspension of an extant criminal sentence pending the outcome of the retrial, knowing that would have been the limit of any such suspension. It follows, for all these reasons, that I reject this final point and the others which relate to the Judge's second conclusion. That conclusion stands. Since I cannot accept any of Mr Grandison's four points arising in relation to section 20, the ground on which Swift J granted permission to appeal fails. Having so concluded, I turn finally to the two 'rolled-up' grounds.

The Article 8 ground of appeal

26. Mr Grandison maintained his Article 8 ECHR ground of appeal, in the face of Swift J's refusal on the papers. He emphasises: that the Appellant has been in the United Kingdom for a very considerable period of time (since 2009); that, as the Judge found, he has lived a hard-working and blameless life here; that there was a lapse of time of 4½ years between the issuing of EAW2 (27.5.16) and the provision of a prison assurance (29.9.20); that such a prison assurance had been directed by DJ Grant, and had not been provided; that this was the basis of the Appellant's discharge on EAW1 by DJ Grant (16.5.16). Mr Grandison submits that circumstances involving the discharge of one EAW and the reissue of a lookalike further EAW is capable, viewed through the prism of Article 8 ECHR, of being a feature undermining the interests of the statutory scheme and speedy finality, or constituting circumvention following prior default as to procedural directions, involving unfair prejudice to the requested person or undermining the public interest considerations in favour of extradition: see the observations to this effect in Camaras v Romania [2016] EWHC 1766 (Admin) [2018] 1 WLR 1174 at §§32-34. Mr Grandison also emphasises, in the context of Article 8, the features which stand as explanation or mitigation for the Appellant's absence from the 2018 Retrial Hearing, something which the Judge described as "a difficult choice" which he could "perhaps understand". He emphasises what he says is an evident failure on the part of the Hungarian authorities to consider less coercive measures. He submits that all of these matters, alongside the other features of the case, support the conclusion that the Judge was "wrong" in striking the Article 8 balance in favour of extradition.

27. I cannot accept that submission. The Judge conducted the familiar 'balance-sheet' exercise. He identified the powerful public interest considerations in favour of extradition, the honouring of international treaty obligations, and affording mutual respect and understanding to the legal systems of other sovereign states. He recognised that the 'no safe haven for foreign criminals' feature of the public interest was reduced by the absence of a finding of fugitivity. He rightly characterised the index offending as a series of planned and quite sophisticated offences whose relative seriousness was reflected in the sentence of 3 years and 6 months, all of which remains to be served. Against these, he recognised such features as: the Appellant's blameless and hard-working life, and his roots developed in the UK, across the time spent here; his good and enterprising life and settled relationship; the communication with the Hungarian authorities and cooperation with the MPS; the discharge on EAW1 and the Respondent's failure to serve a prison assurance, with its contribution to the delay and passage of time; the impact and stress on the family unit including the effect on the plans for the Appellant and his partner (and fiancée) to marry and have children; the hardship which extradition would bring, including the impact on the partner's studies; the difficult choice which the Appellant had made not to return to Hungary for the 2018 Retrial Hearing; the facts that the offences were not violent or sexual in nature and were 11-13 years ago; and the fact of the Respondent's action having contributed to the delay and in causing hardship over and above what the Appellant would have suffered had the Respondent acted expeditiously. The Judge also recognised that the Appellant was not the carer for any children, that there were no significant health issues for him or his partner. He concluded that the hardship was not at a level which would outweigh the public interest considerations in favour of extradition. Swift J did not consider it reasonably arguable that the Article 8 outcome was wrong. I agree. The public interest considerations in favour of extradition, clearly and decisively, outweigh those weighing against it. Extradition is clearly not disproportionate in Article 8 terms. I refuse permission to appeal on this ground of appeal.

The abuse of process ground of appeal

28. Finally, Mr Grandison maintained the abuse of process ground of appeal, as to which Swift J also refused permission to appeal. Mr Grandison emphasises that abuse of process can arise from the issuing of a new lookalike EAW in circumstances where there has been a previous discharge in relation to an earlier EAW, especially where there was a failure to comply with directions from the UK extradition court. Mr Grandison cites the recent case of Wawrzyczek v Poland [2021] EWHC 64 (Admin) at §102, where the Court described abuse of process as "nuanced", "separate and distinct". He criticises the Judge for saying (several times) in considering and rejecting the abuse of process argument, that the considerations relied on could be "dealt with" by the Court in "balancing the factors" in relation to Article 8, as he had done. Mr Grandison cited Wawrzyczek at §104, where the Court explained (referring to earlier authority including Giese v USA [2018] EWHC 1480 (Admin) [2018] 4 WLR 103):

> ***… it is not, without more, an abuse of process for a judicial authority to issue a second EAW even where a first [EAW] has failed through its own fault. It may, or may not, be so, depending on the facts. What is required … is a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case in order to determine whether extradition on the second EAW would result in unjust oppression to the [requested party].***

29. Mr Grandison pointed to Jasvins v Latvia [2020] EWHC 602 (Admin) as an illustrative example of abuse of process. In that case, the requested person had been discharged on EAW1 on the grounds of abuse of process. He had submitted, and the court had been concerned, that the index drugs prosecution, conviction and 5-year custodial sentence had arisen for an "improper reason". The record showed that he had previously been fined, but he said the matter was reopened and pursued against him, after he complained of having been assaulted by the police. The Latvian judicial authorities had been directed by the High Court (Collins J) to file any information to rebut the claim, by 7.12.16, but had failed to do so. At the substantive appeal (24.1.17), the High Court (Dingemans J) had declined a request for a further adjournment, allowed the appeal and discharged the requested person, because there were reasonable grounds for believing that there had been misconduct, which had not been rebutted. EAW2 was then issued, together with evidence of precisely the kind for which the adjournment had been refused. Extradition was ordered but the High Court allowed an appeal on grounds of abuse of process. The issuing of EAW2 and the evidence adduced in support of it meant this: the Latvian judicial authorities were now being permitted to rely on the very information on which Dingemans J had prevented them from relying because of their failure to comply with Collins J's order (see §12). It was "not acceptable", "on the facts of this case", that the Latvian prosecutor "should, through proceedings to enforce [EAW2], be able to do precisely what he was prevented from doing by Dingemans J's decision", that decision having been to refuse the adjournment in the appeal in relation to EAW1 (see §22). The Court (at §19) cited Camaras at §32:

> ***A court must be able to give effect to its own procedural directions, and to prevent their being circumvented on appeal or by a further EAW. That furthers rather than undermines the statutory scheme.***

The Court (at §19) also cited Giese at §31:

> ***There will be cases where a judicial authority has, for example, failed to comply with court orders in the first extradition proceedings, where a question of abuse of process may arise for consideration in connection with a second set. Similarly, where in the first set of proceedings the requesting state has abjectly failed to get its evidential house in order. But a mechanistic approach to abuse is inappropriate.***

The Court said this (at §§20-21):

> ***Where there are successive warrants or successive extradition requests, if proceedings on the subsequent warrants can properly be characterised as a collateral attack on a decision in proceedings on the first warrant, the latter proceedings are capable of amounting to an abuse of process. It may be possible to go further and say that ordinarily this will be the case. But the outcome in any given situation must depend on the overall merits-based assessment of public interests and careful evaluation of the facts…***
>
> ***There is a particularly important public interest that the system of enforcement of EAWs is not undermined. That public interest covers a number of objectives. One objective, plainly, is that those who are charged with criminal offences overseas or have been convicted overseas and are wanted for punishment are provided to requesting authorities. But maintaining the integrity of the EAW system includes ensuring that decisions can be made expeditiously and that courts are able to exercise effective case management powers. Put bluntly, if such orders are made, the starting presumption is that they will be complied with. Where, as in this appeal, the claim of abuse of process arises from a failure in earlier proceedings to comply with a court order, the court in the later proceedings must assess the significance of permitting the Requesting Authority to avoid the consequences of the earlier decision, while also taking account of the public interest in that particular extradition. This will also include considering the gravity of the alleged or***

> ***actual offending, and the prejudice (if any) to the requested person arising from pursuit of the further warrant. In other words, a Giese-style broad, merits-based judgment taking account of the public and private interests as they are manifest on the facts of the particular case.***

Applying the approach identified in these passages, Mr Grandison says the issuing of EAW2 in the present case was an abuse of process.

30. Swift J – who, as it happens, had co-authored the judgment in Jasvins – did not think it was reasonably arguable that there has been an abuse of process in the present case. I too have also come to the conclusion that the abuse of process ground of appeal is not well-founded, though for my part I accept its 'reasonable arguability' and formally grant permission to appeal. The point is not well-founded, in my judgment, for the following reasons. The starting point is that the Courts have been careful to avoid any rigid rule or mechanistic approach. Where there has been a failure to comply with court orders "a question of abuse of process may arise". What is inescapable is the need for "the overall merits-based assessment of public interests and careful evaluation of the facts". This is not a case like Jasvins where there was a live question of historic fact, calling for evidence, as to what had happened. This is a case in which extradition could not be Article 3-compatible, unless and until Hungarian authorities were in a position to make a clear and concrete promise guaranteeing the position as regards the future action of Hungarian authorities. As in Giese, where there was no abuse of process (see §43), this is a case where an "adequate assurance" was needed in relation to future action, so as to "neutralise" a human rights argument, rather than being a situation of seeking to "reargue" points which had been "lost" (see §§34-35). The integrity of the EAW system and ensuring expeditious decision-making justified DJ Grant in making directions giving a deadline for the requisite prison assurance, by way of directions which were to be complied with, and then discharging the Appellant on EAW1 when it was not forthcoming. The Respondent was clearly placing itself at risk, insofar as it defaulted assuming that it could simply start again with a lookalike EAW2. The significance of permitting the Respondent to avoid the earlier consequences lies in two features: (i) the Respondent being able subsequently to give the requisite guarantee as to Hungarian authorities' own future action, allaying the concerns for the future which arise in relation to Article 3 and prison conditions; and (ii) the adverse consequences for the Appellant in having to face a fresh EAW and fresh extradition proceedings. As to these, as in Giese (see §42): the first feature (number (i) above) serves to vindicate the Appellant's ECHR rights and ensure that the strong public interest in upholding extradition arrangements is recognised; whereas the second feature (number (ii) above) is not, in my judgment, such as to give rise to unfairness, still less oppression. It is true that the position which has arisen in relation to EAW2 has involved a substantial delay and passage of time. However, it needs to be remembered that – as the MPS explained in the MPS Email – EAW2 was not executed while the Appellant was proceeding with pursuing his requested retrial in Hungary. That pursuit started with the July 2016 request for the retrial. It then led to various retrial dates with summonses to attend. It culminated in the 2018 Retrial Hearing and the 2018 Termination, which the Appellant then made several unsuccessful attempts to challenge, and which was upheld in a series of decisions the final one of which was 13 June 2019. When the Appellant's attempts in the Hungarian courts had failed, the Appellant was subsequently arrested (17.6.20) on EAW2 and the prison assurance – which necessarily needed to a concrete promise about what would happen following his surrender – came soon after (29.9.20). Applying the approach seen in the authorities – and testing the matter by stepping back and looking at the outcome, in all the circumstances – in my judgment, there are powerful public interest considerations in

support of extradition, and there is no "unjust oppression" of the Appellant. In my judgment, the Judge's conclusion that there was no abuse of process was not "wrong". Rather, it was correct. I reject this ground of appeal.

Conclusion

31. For the reasons which I have given: (1) the appeal on the section 20 ground is dismissed; (2) permission to appeal on the Article 8 ECHR ground is refused; (3) permission to appeal on the abuse of process ground is granted; and (4) the appeal on the abuse of process ground is dismissed.