Neutral Citation Number: [2022] EWHC 1529 (Admin)

Case No: CO/2559/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 20th June 2022

Before:
MR JUSTICE FORDHAM

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Between:

VASILE STANCIU **Appellant**

- and –

PROSECUTOR GENERAL'S OFFICE OF THE REPUBLIC OF ARMENIA **Respondent**

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Graeme Hall (instructed by Lawrence & Co) for the **Appellant**
Adam Payter (instructed by CPS) for the **Respondent**

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Hearing date: 16.6.22

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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 was the in-person oral hearing of applications for permission to appeal and to adduce fresh evidence in an extradition case. The applications were adjourned into open court by Jay J who considered the papers on 5 April 2022. This case was given a one-hour allocation of Court time – with a pre-reading window to match – as one of several cases in a day's list. That time-allocation was not revised or revisited. It could I think only have worked with super-crisp skeletons followed by rapier-like oral submissions. The hearing proved effective to interrogate, 'drill-down' and tune-in to the essence of what was being said. But it was a challenge for us all. Counsel had produced 22-page (Appellant) and 26-page (Respondent) skeleton arguments. There were three bundles: 953-pages, 113-pages and 691-pages. In the event, the hearing ran from 2pm to well after 4:30pm, and so I decided I would need to put my judgment in writing. This is not ideal and has knock-on effects. I am not criticising anyone. I expressed my gratitude to both Counsel for their industry and assistance and I repeat that gratitude here.

2. The Appellant is aged 35 and a Moldovan national. He is wanted for extradition to Armenia. That is in conjunction with an accusation Extradition Request, issued on 15 May 2020 and certified by the Home Secretary on 21 May 2020. The alleged index offending arises out of conduct which took place between November 2015 and February 2016. The Appellant was arrested on 16 July 2020 and has been in custody since. After a two-day oral hearing on 13 and 14 May 2021 District Judge Snow ("the Judge"), by a judgment dated 27 May 2021, sent the case to the Home Secretary who ordered the Appellant's extradition on 12 July 2021. Mr Hall for the Appellant asks the Court to grant permission to appeal on four grounds. He also applies for permission to adduce fresh evidence in the form of a Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") published on 26 May 2021 together with the response of the Armenian Government published the same day. Mr Payter for the Respondent applies for permission to adduce fresh evidence in the form of five rounds of "further information" dated 16 September 2021, 29 September 2021, 12 October 2021, 25 October 2021 and 23 May 2022. Those are the applications before the Court.

Resolution

3. As to permission to appeal, Mr Hall has persuaded me that the Article 3 prison conditions ground, in the particular circumstances of the present case, crosses the threshold of reasonable arguability and warrants the grant of permission to appeal. As to fresh evidence applications, Mr Hall's arguments on the Respondent's fresh evidence application have succeeded to the extent of persuading me that there are sufficient issues relating to that putative fresh evidence that the appropriate course is to defer the question of admissibility to the Court dealing with the substantive appeal. That Court will be able to consider the position 'in the round' and resolve the contested arguments as to whether, in the light of the applicable legal principles and alongside the other material in the case, it is appropriate for permission to adduce that evidence to be granted. Further, since the Court dealing with the substantive hearing will be evaluating whether the CPT 2021 Report and Response are material capable of being "decisive", a question which is bound up with the other issues which that Court will be evaluating, I will similarly defer the question of formal permission to adduce that putative fresh

evidence to the Court. In my judgment, that is not to saddle that Court with satellite applications apt for resolution today. Rather, it is to recognise the interrelationship of admissibility, relevance and weight which can readily be addressed in one swoop. No party will be disadvantaged or taken by surprise. The arguments for the substantive hearing will be able to address all issues relating to the fresh evidence, and on the conclusions that follow from its admissibility or exclusion. As to the other grounds of appeal, I refuse permission to appeal. In my judgment, they have no realistic prospect of success.

Article 3

4. I start with the Article 3 (prison conditions) ground of appeal and putative fresh evidence. A number of particular features of the present case have combined to lead to my conclusion that the reasonable arguability threshold has been crossed, and the contested fresh evidence should be resolved at a substantive hearing. One feature which does not factor into my grant of permission to appeal is the attack which Mr Hall seeks to make on the Judge's assessment of the putative expertise of "opinion" expressed by the person (Mr Arshak Gasparyan) who had been put forward in this case as "an expert on prison conditions in Armenia". The Judge concluded, by reference to the case of Brazuks v Latvia [2014] EWHC 1021 (Admin) at §42 that Mr Gasparyan had produced relevant "open source material" in his reports but was not an "expert" for the purposes of giving expert "opinions" relevant to the assessment of Article 3 risks in the present case. That was a nuanced conclusion. It meant that the appropriate course was to admit Mr Gasparyan's evidence insofar as it identified the contents of material available in the open source material to which it referred. Mr Hall says that conclusion was arguably erroneous or has become arguably erroneous by reference to fresh evidence which is said to 'vindicate' the opinions which were expressed. I do not agree. In my judgment, the Judge's approach was – and remains – unassailable. I make clear that my grant of permission to appeal is not intended to extend to the distinct sub-issue of the Appellant's attempt to impugn the Judge's approach and conclusion as to Mr Gasparyan and his opinions.

5. These are the particular features. First, there is the post-judgment availability of the 2021 CPT Report and Government Response. Although relating to a visit in late 2019, this is relevant and recent material. The Government Response is dated 16 April 2021. It was not before the Judge or considered by the Judge. It discusses relevant concerns including as to the prison at Armavir (which the Respondent says – relying on the Judge's assessment or alternatively the fresh evidence – is the relevant focus). These include relevant content relating to matters such as: inter-prisoner violence (including intimidation and extortion) within the prison; plans (and their progress) to deal with this by criminalisation and segregation; the increasing deterioration of material conditions at the prison; particular issues relating to the lack of any effective ventilation system within the prison; and action taken and progress made (or not taken or made), in the light of earlier assurances.

6. The second key factor is a reasoned judgment of Deputy Senior District Judge Ikram on 11 October 2021, delivered on 24 March 2022, in the case of Government of Armenia v Roca. That judgment found extradition would be incompatible with Article 3, based on an analysis of risk in the light of evidence as to prisons including Armavir, and having regard to the CPT Report 2021 and other evidence. One of the key strands within that case, as Mr Payter correctly points out, related to the treatment of LGBT

people, in the context of that particular appellant. It may be that this Court would distinguish the conclusions and reasoning in that judgment for that reason. It may be that this Court would do so based on Mr Payter's contention that DJ Ikram did not have specific evidence from the Government, relying in this case on the further information including the five rounds of fresh evidence. There are questions about what this Court should make – for the purposes of the present case – of the careful analysis in that judgment of the evidence that was there put forward which materially overlapped with the documentary evidence in the present case. I do not have the confidence, at this permission stage, to put the Roca judgment to one side as plainly distinguishable. Especially in circumstances where it is a judgment which evaluated the CPT Report 2021, together with other evidence, including from the head of the 2019 CPT inspection team who described a visit in September 2021. The points reflected in the Roca judgment could matter.

7. The third key factor is this. In the present case there are multiple rounds of "further information" – said to include "assurances" – put forward by the Respondent. I have explained that no fewer than five rounds of this material post-date the Judge's judgment and could only be relied on at this appellate stage with the Court's permission. Mr Payter says this material must come in as "assurances", citing Government of the United States of America v Assange [2021] EWHC 3313 (Admin) [2022] 4 WLR 11 at §§38 to 42). He also submits that, in so far as the contents do not constitute "assurances", this is fresh evidence which a respondent judicial authority – who succeeded in the court below – should, in the interests of justice, be entitled to adduce. Especially given that the Appellant is seeking to adduce fresh evidence – the 2021 CPT Report – and the issues in that fresh evidence are themselves addressed in the five new rounds of further information. Mr Hall submits to the contrary: the Respondent's evidence, or some of it at least, should be excluded by reference to the principle that a judicial authority does not have "carte blanche to bolster an existing decision in [its] favour" (FK v Germany [2017] EWHC 2160 (Admin) at §40). He points to examples where, as he characterises it, even "assurances" have not been permitted to be adduced in cases where ample opportunity was previously available. Mr Payter says he can succeed without reference to the five rounds of further information and can rely on the conclusion arrived at by the Judge. He says he can succeed without reference to the earlier rounds of "assurances" which were before the Judge, who decided that the legal threshold calling for Article 3 assurances had not been reached. Having said that, the Judge did discuss and rely, at various points, on the "further information" which had been adduced before him by way of "assurances". This Court has five rounds of further information, said to be (or include) relevant assurances. Jay J said he was "troubled" by the (then four) rounds of Respondent's further information, put forward at this appeal stage. Mr Hall convincingly submitted (in his reply) that, in the context and circumstances of this particular case, given that the Respondent is putting forward multiple rounds of fresh material including "assurances", at this appellate stage, this is not a situation conducive to resolution at the permission-stage and what is needed is an evaluation at a substantive appeal hearing. I accept that submission. With the assistance of Counsel, I will make an order for directions in relation to the substantive appeal hearing of the Article 3 prison conditions argument in this case.

Oppression or injustice and the passage of time

8. I refuse permission to appeal on this ground of appeal. In my judgment, the Judge – unassailably and beyond reasonable argument – found that it would not be "unjust" or "oppressive" pursuant to section 82 of the Extradition Act 2003 to extradite the Appellant in the light of the passage of time and its implications. The Judge identified the legal principles and key authorities with care, and I can detect, by reference to the submissions now made, no arguable legal inadequacy in his doing so or arguable material error in the approach that follows. The Judge recognised that the Appellant was not a "fugitive" for the purposes of section 82. He set out carefully the chronology, identified the arguments on both sides, and conducted a cogent reasoned analysis by reference to a series of factors in the case.

9. The essence of Mr Hall's argument, as I saw it, really came to this. The Armenian authorities had recognised the Appellant as an accused as at March 2017. The accusation Extradition Request was not issued until May 2020. The alleged criminal conduct had taken place in 2015 and 2016. There was plainly a significant, and in any event relevant, passage of time. On the particular facts, there was a very serious consequence of the inaction or deferred action during that passage of time. The reason is this. In November 2018 an "Amnesty Law" came into force in Armenia, in conjunction with the "Velvet Revolution". In relation to two of the four matters on which the Appellant's extradition is sought, he would – had he been promptly pursued – have invoked that Amnesty and have secured a one-third reduction in any sentence following any conviction in Armenia. But that opportunity was lost in February 2019, because the window closed, in relation to those two matters. Although the Appellant was (for the most part) in Moldova at that time, he could and should have been contacted by the Armenian authorities. The failure to do so deprived him of the rights he could have invoked, if convicted and sentenced, under the Amnesty. On the evidence, he could have achieved a significant reduction which could have been around 40 months in the custodial sentence which if convicted could be some 10 years. The Judge wrongly characterised an impact referable to sentence as going only to "oppression" rather than to "injustice". That was on the basis that "injustice" is limited to the "trial process". But a criminal sentence is a relevant part of the "trial process", for the purposes of section 82 "injustice". The Respondent cannot fairly rely on points about whether contacting the Appellant would have "tipped him off", especially in circumstances where the Appellant has been recognised not to have been a "fugitive". Although the Judge had in mind the need to consider each of the four alleged offences individually, he failed to recognise – as he ought to have done – that it could be, and was, unjust or oppressive to extradite the Appellant in relation to those two offences in respect of which the sentence could now no longer be affected by the Amnesty Law; and the Judge ought at least to have discharged the Appellant in relation to those two alleged offences. In all the circumstances it is reasonably arguable that the Judge's conclusion was a wrong one and there is a realistic prospect that this Court on a substantive hearing would overturn it.

10. I can see no arguable ground of appeal here. I can see no arguable, material error in the approach by the Judge, or inadequacy in the Judge's reasoning. Indeed, even if I posit this Court re-evaluating the issues of injustice and oppression "afresh" in the light of all the evidence in the case – a case in which no proof of evidence or witness statement was ever adduced from the Appellant himself – I see no realistic prospect of this conclusion by the Judge being overturned.

11. The Judge relied on the following seven factors. (1) The Government was not under any obligation to inform the Appellant of the provisions of the Amnesty Law. (2) That Law would not have prevented the prosecution of the Appellant but rather would affect the length of any prison sentence imposed for two of the four offences. (3) The Appellant will continue to have the benefit of the Amnesty Law in relation to the other two offences. (4) The Government approached the case on the basis that the Appellant was a Moldovan citizen who was resident in Moldova and that Moldova did not extradite its own citizens. (5) There is no evidence of any culpable delay. (6) It was unrealistic for the Government to prepare a full Extradition Request for the time that the Appellant was present in the United Kingdom, between November 2018 and January 2019. (7) There is no evidence that the Appellant would have taken advantage of the Amnesty Law. In my judgment, beyond argument, these are relevant and convincing features of an unassailable overall evaluative outcome. It is true that the Judge regarded "injustice" as being limited to the "trial process" and not including questions of sentence. But the Judge also recognised the substantial overlap between "oppression" and "injustice" and it is clear that the outcome would have been no different, given the relevance of the same factors as the Judge identified. There is no arguable oppression or injustice in the circumstances of this case, from the requesting state authorities not having alerted the Appellant to allow him potentially to invoke a protection – if convicted and sentenced – within the relatively short window between November 2018 and February 2020.

12. As to considering the alleged offences individually, the Judge had that principled approach well in mind. Mr Payter convincingly analysed the implications of this aspect in his oral submissions: although it is appropriate to give separate consideration to distinct alleged criminal offences in an accusation extradition warrant, for the purposes of applying tests of oppression and injustice, the question of impact needs to be evaluated in terms of where this leads; here, the "lost Amnesty rights" point does not arise in relation to two of the four criminal offences; the impact therefore has to be seen in terms where the Appellant would, in any event, be extradited in relation to those two matters; having supposedly lost a potential sentence reduction for the other matters, the Appellant seeks to avoid standing trial at all for those two matters; and the alternative is even more striking with the Appellant being discharged in relation to all of these matters on the basis of an argument about whether he could and might have invoked a protection involving a partial sentence reduction in two respects. No "oppression" or "injustice" analysis can support such outcomes.

Particulars

13. I refuse permission to appeal in relation to the ground of appeal concerning particulars and section 78 read with section 2(4)(c) of the 2003 Act. In order to understand this ground, it is necessary now to identify the four alleged offences identified from the Extradition Request and supporting materials. The offences had been described as follows: (i) theft; (ii) attempted theft; (iii) preparing and selling fake payment documents; and (iv) attempting to prepare and sell fake payment documents. The alleged offending arose out of and in conjunction with the Appellant and a co-defendant having allegedly attached "skimming devices" to ATMs in Armenia. Arising out of that conduct, there are the four alleged offences. I think their essence can, for present purposes, sufficiently be identified by means of the following broad descriptions. The offence (i) theft concerns accessing amounts of cash by withdrawals from ATMs using

cards generated from the skimming activity. That means successfully withdrawing cash from an ATM. The offence (ii) attempted theft concerns attempting to access amounts of cash by withdrawals from ATMs using cards generated from the skimming activity. That means unsuccessfully withdrawing cash from an ATM. The offence (iii) preparing and selling fake payment documents means successful actions in the manufacture of cards using details transferred from the product of the skimming activity for sale. The offence (iv) attempted preparing and selling fake payment documents means unsuccessful actions relating to the manufactured cards (using details transferred from the product of the skimming activity) for sale.

14. Mr Hall took me through the materials which he submitted show, reasonably arguably, that there was a breach of the particularisation standards arising under the statute. He did not dispute that the Judge set out the relevant general principles by reference to authority. He invokes key passages from the authorities such as Dhar v Netherlands [2012] EWHC 697 (Admin) at §§68 and 81. The first of those passages (§68) was referenced in terms by the Judge. It states the principle that particulars must be sufficient to enable the requested person to "consider whether any statutory bars may apply". Two points are made as to why the particulars were legally inadequate or failed to achieve that necessary purpose.

15. First, Mr Hall submits that there is a deficiency in particulars in relation to "location". He says that is a fixed statutory precondition (section 2(4)(c)) which cannot be answered by reference to the location of harm or impact of the criminal conduct, as may be appropriate in addressing other extradition bars. He accepts that the "skimming" activity is squarely alleged to have taken place in Armenia. He accepts that the banks and bank accounts from which the money was or would have been taken were also in Armenia. That is the case for money which was taken, or attempted to be taken, by withdrawals using ATMs. It is also the case for any amounts accessible to anyone seeking to use the cards that were sold or attempted to be sold. He emphasises, in particular, that the Respondent has not specified at what location (or country) the cards were allegedly manufactured. He emphasises that the Extradition Request Documents before the Judge did not, and still do not with any clarity or precision, identify where the ATMs were located at which the withdrawals or attempted withdrawals were allegedly made. Among the documents he showed me was the Extradition Request document referring to withdrawals and attempted withdrawals of cash from ATMs in countries outside Armenia: "out of the borders of the Republic of Armenia, in particular, in European countries and et cetera". Mr Hall submitted, at one point, that there is a requirement to specify location in relation to alleged criminal actions. He submitted, at another point, that there is a requirement to specify location "at least where it is known" by the requesting judicial authority.

16. In my judgment, beyond reasonable argument, the particulars that were given in relation to location leave the Appellant in no doubt about the nature and extent of the allegations he faces. They contain sufficient particulars to enable the Appellant to identify the nature and extent of the allegations that he faces and there is no fog of ambiguity. All of that is what the Judge, unassailably, found. Mr Hall submitted that the locational detail was insufficient to enable the defendant to consider whether any statutory bars may apply. In particular, he invokes the bar of "forum". He tells me this featured in his oral argument to the Judge in relation to particulars and the application of Dhar §68. (The Judge referred to dual criminality and specialty.) I will return below to "forum".

But, in my judgment, there was nothing in the locational position relating to particulars which, in the light of the context and circumstances and the nature of the alleged criminal activity in the present case, was arguably insufficient to enable the Appellant to consider whether the statutory bar of forum might apply. As I shall explain below, there has been nothing to prevent the Appellant from raising that bar, including in the light of further information if he and his representatives consider that there was a proper viable forum argument to be made in this case.

17. Secondly, Mr Hall submits that the particulars relating to two specific amounts given by and on behalf of the Respondent authority arguably gave rise to a fatal lack of clarity. He submits that they made a material (34%) difference because the "attempted theft" offence is described on occasion in the material as involving an equivalent of £29,000 (20,577,323 AMD) and on other occasions the equivalent of £20,000 (13,600,000 AMD). He says, unless there is an undisclosed fifth offence, there is a conflict in that information which arguably breaches the standards of particularity required, because a requested person is legally entitled to know the value, at least in an offence involving money. He submits that all of this could work to impede the Appellant's ability to invoke the extradition principle of specialty if extradited, in the light of the conflict of evidence and lack of clarity as to the value of the attempted theft offence.

18. In my judgment, beyond reasonable argument, the Judge convincingly and unassailably dealt with this point. The Judge explained why the two figures which had been given made sense and were to be reconciled. The key is to remember that there were two offences of attempt. Each of them was an attempt which had a value in terms of what amounts from Armenian bank accounts would have been accessed or accessible. One of them (offence (iv)) involves an alleged attempt to sell cards onto which details have been transferred which cards would have allowed access to the sums of money standing in those bank accounts. The Judge explained that this is the £29,000 equivalent figure. The other (offence (ii)) involves an alleged attempt to withdraw funds from ATMs using the product of the skimming devices. The Judge explained that this is the equivalent £20,000 figure. That analysis of the evidence was plainly open to the Judge. Mr Hall tries to undermine it by reference to documents. Foremost among this was the "opening note" used on behalf of the Respondent. But that point immediately falters when – as I am told – the misdescription was corrected in Counsel's oral opening. It is necessary to scrutinise uses of the phrase "attempted theft", and to do so remembering that all four offences were convincingly characterised for the Judge as ones which would be, in this jurisdiction, charged as frauds or attempted frauds. The £29,000 equivalent figure is expressly described in the Extradition Request documents (in a decision of 6 March 2017) as relating to the "processing" of the "232 plastic cards" on which was the information relating to "220 customers in 12 commercial banks". The £20,000 figure is described in the Extradition Request documents as relating to attempted withdrawals from ATMs. The Judge's assessment is convincing and, beyond argument, was open to the Judge. No "specialty" protection, even arguably, is undermined. Again, sufficient particulars have been given to enable the Appellant to identify the nature and extent of the allegations he faces and there is no fog of ambiguity. Again, the Judge unassailably so found. In those circumstances other questions – about whether and when "value" is or is not to be expected or required of particulars – do not arise.

Zakrzewski abuse

19. That leaves a final ground for appeal which alleges an "abuse of process" applying the principles articulated by the Supreme Court in Zakrzewski v Poland [2013] UKSC 2 [2013] 1 WLR 324 at §§12-13. The argument in essence, as I saw it, runs as follows. There is an abuse of process principle applicable in extradition cases where there is a material error or omission in the particulars, which particulars are wrong or incomplete in some respect which is misleading, where the error or omission becomes clear and is beyond legitimate dispute, and where the error or omission is "material to the operation of the statutory scheme". That is, at least arguably, the position in the present case for the following reasons. (1) The Extradition Request documents which were before the Judge did not identify any details as to the locations (including the individual countries) at which ATMs were allegedly accessed or attempted to be accessed. (2) That has materially changed by virtue of what is now said on behalf of the Respondent (in one of the new rounds of putative fresh evidence). What is now said of the alleged thefts from ATMs was that certain – significant and identified – monetary amounts were stolen from ATMs "on the territory of Great Britain". (3) If that information had been disclosed in the proceedings before the Judge, the consequence is that the Appellant would have been able to invoke a "forum" bar under section 83A of the 2003 Act. (4) In invoking that forum bar the Appellant would have been able to put forward oral evidence and no doubt would have been cross-examined on it. (5) That protection has been lost to him (unless this Court were to grant permission to appeal, allow the appeal and remit the case on this ground) and the loss of the ability to invoke the forum bar constitutes a clear species of Zakrzewski abuse of process. (6) That is because: there is now clarity in relation to a point regarding particulars where there was previously a material omission; the previous omission is "material to the operation of the statutory scheme" because of the bar (forum) which arises by reference to the statutory scheme (section 83A) and could have been invoked. (7) In those circumstances, and for those reasons, there is an arguable abuse of process and permission to appeal should be granted on this ground.

20. In my judgment, there is no realistic prospect of that argument being accepted by this Court at a substantive appeal. In my judgment, beyond argument, the position is straightforward. In the light of what is now known about the particular sums which are said to have been involved from Armenian bank accounts in the use of ATMs in the territory of the United Kingdom, if the Appellant and his representatives really think there is some viable "forum" argument, they would be able to advance it as an extradition bar and it could be considered. Moreover, if and insofar as it was thought that that forum bar argument, arising out of that material, called for a witness statement or proof of evidence from the Appellant (which he has never provided in relation to any other issue in this case), then that could be put forward and could be considered. The Zakrzewski abuse of process principle does not stand as a "backdoor" way to bar extradition by complaining that material – whether particulars or anything else – had only been known an extradition bar argument could have been advanced before the magistrates' court; still less, in circumstances where the requested person is not prepared to raise and articulate that bar directly – through the "front door" – before the Court. It cannot be right that an abuse of process bar to extradition arises by reference to another, statutory bar, which could have been raised as a direct argument. It cannot be right that the abuse of process is made out because of the fact that an argument could have been made, and without reference to the substance of that argument and whether it would or could succeed on its own terms. As Mr Payter convincingly pointed out, this would undermine the function of the abuse of process argument as a "residual"

protection. It would also mean that abuse of process could be substantiated in a case in which the relevant bar could or would not itself be (or have been) made out. Moreover, it would cut across the observations made in Zakrzewski at §10 about the safeguard in a requesting state being able to put forward additional information at any time. It would mean that additional information constitutes the abuse of process, because of something that could have been said about it if produced earlier. At the very least, in my judgment, it would be essential for the requested person invoking the residual abuse of process jurisdiction to demonstrate the materiality of the new information in terms of a viable and credible forum bar argument. There has, in my judgment, been no attempt to do so in this case. And it is not difficult to see why. In my judgment, it is obvious in the present case that this information about the amounts involved in accessing UK ATMs could not have supported, and still could not support, a viable argument based on forum as a bar to extradition. The materiality is entirely absent. Put another way, the necessary element of prejudice is entirely absent.