Neutral Citation Number: [2022] EWHC 3163 (Admin)

Case No: CO/659/2021

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

Friday 9th December 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

ALEXANDRU RISTIN	**Appellant**
- and -	
COURT OF TIMISOARA, ROMANIA	**Respondent**

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- -

Benjamin Seifert (instructed by Coomber Rich Ltd) for the **Appellant**
Stefan Hyman (instructed by CPS) for the **Respondent**

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Hearing date: 29/11/22

- -

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. The Appellant is aged 28 and is wanted for extradition to Romania. That is in conjunction with a conviction European Arrest Warrant ("the EAW") issued on 17 October 2019 and certified on 1 June 2020. The EAW relates to a 15 month custodial sentence, all of which remains to be served in Romania (subject to a few days of qualifying remand prior to extradition bail). The Appellant was arrested on 19 June 2020 and so the EU Framework Decision governs this case. His extradition was ordered in consequence of a judgment dated 22 February 2021 (the "Judgment") of District Judge Godfrey ("the Judge"). That followed an oral hearing on 25 January 2021 at which the Appellant gave oral evidence. Other evidence included a report of a consultant psychologist, Mr Rogers, dated 5 December 2020 ("the Rogers Report"). The Judge treated the Rogers Report as agreed evidence, in circumstances where the Respondent had confirmed that no questions were to be asked of Mr Rogers. There were three issues singled out by the parties before the Judge: Article 3 ECHR (risk of inhuman and degrading treatment or punishment); Article 8 ECHR (private and family life); and section 25 of the Extradition Act 2003 (injustice or oppression by reason of physical or mental condition). Article 8 ECHR is the sole ground of appeal to this Court, with the permission of Sir Ross Cranston at an oral renewal hearing on 23 August 2022.

2. The extradition background is as follows. On 29 January 2016 the Appellant committed a drink-driving offence in Romania (aged 22). His blood alcohol reading was 1.30g/L, against a legal limit of 0.80g/L. In consequence of his conviction, on 20 October 2016 the Romanian criminal court imposed a custodial sentence of 12 months, suspended for two years on conditions including 300 hours of unpaid work which he performed. That suspended sentence took effect from 8 November 2016. On 20 January 2017 the Appellant committed a second drink-driving offence in Romania (aged 23). His blood alcohol reading on that occasion was 1.08g/L. In February 2017 he came to the UK but returned to Romania when required to see his probation officer, under the terms of the suspended sentence. He was present in court in Romania on 16 May 2019 when convicted of the second offence. He was sentenced to a 9 month custodial sentence for that, together with the fully-activated 12 months sentence, previously suspended. By operation of Romanian 'totality' law, when the two sentences were added together, the new sentence was reduced by two-thirds to 3 months. That produced the overall 15 month custodial sentence which is the subject of the EAW. In Romania, the Appellant filed an appeal. With that appeal pending, he travelled back to the UK in August 2019. Two months later, on 10 October 2019, the Romanian appeal court dismissed the appeal. That same day, a decree of imprisonment was issued. The Appellant became aware of that outcome promptly, in October 2019, and knew he was now wanted to serve his sentence. As I have already explained, the EAW was issued on 17 October 2019, certified on 1 June 2020 and his arrest was on 19 June 2020.

3. As can be seen from this sequence of events, at the time of the hearing before the Judge in January 2021, 17 months had elapsed since the Appellant's return to the UK in August 2019. Four years had by then elapsed since the Appellant had first come to the UK in February 2017. A further period of 22 months has elapsed as at the date of the hearing of this appeal before me. Mr Seifert asks me to consider the entirety of the

passage of time from the date of the first offence on 29 January 2016, a point to which I will need to return.

4. To the extradition background need to be added two further strands in the sequence of events. The first is that on 17 October 2010, aged 16, the Appellant and his girlfriend were involved in a serious gas explosion at his grandparents' house, when the girlfriend lit a cigarette. The Appellant suffered 25% (one description says 35%) burns. He was hospitalised in Germany and was in an induced coma for six weeks. His girlfriend died. There were reports into the physical and mental health implications of the explosion, trauma and burns. The Appellant subsequently turned to drug and alcohol use. The Judge recorded that the Appellant had not received the appropriate treatment and support, which had been recommended, and that all of these circumstances had not been considered in the Romanian sentencing in respect of either of the drink-driving offences. In his report, Mr Rogers identified the difficulties of "executive functioning" arising from the trauma which he described as capable of explaining the Appellant's criminal conduct. Mr Rogers also recommended a referral to a neurologist in the UK. As to that, an application to extend the Appellant's legal aid representation order in this appeal was granted by this Court on 28 October 2021. That did not produce evidence which assisted the Appellant. In January 2022 his representatives confirmed to the Court that they would not be relying on that report. In those circumstances, as Mr Seifert accepts, I can properly proceed on the basis that there is no undiagnosed health condition.

5. The second strand concerns other offending. Two months after his May 2019 conviction in Romania for the second drink-driving offence, the Appellant was in Germany where he committed criminal offences of driving without a licence and document forgery, for which he was convicted and fined by a German court on 12 December 2019. In addition, the circumstances of the Appellant's arrest in the UK on 19 June 2020 involved other criminal conduct. The Appellant was found to be driving without a licence and in possession of a Class A drug (cocaine). In respect of each of which offences he pleaded guilty and was fined. In consequence of this, there were two errors in the Judgment. One was that the Judge's description of the chronology was incorrect: he described the June 2020 offending as involving Class B cannabis. The other was that the Judge's Article 8 'balance sheet': he included in the Appellant's favour that he had no UK convictions ("he has not offended here at all").

6. The Judge's conclusion on Article 8 was that:

> ***70. In all the circumstances, the extradition of the [Appellant] will not disproportionately interfere with any person's right to respect for private and family life. It is compatible with the Convention rights.***

7. The Judgment recorded that the Appellant had no partner in the UK or children here, it being accepted that he had "no family life in the UK". He had worked in the UK. The Judgment recorded, among the Article 8 'balance sheet' factors against extradition, that the Appellant had "started to live a settled life in this country", that he was "maturing"; that the "extradition offences occurred when [he] was young"; that he had "carried out 300 hours unpaid work and so been punished to that extent"; and also that there was "an unquantified risk that [he] will be unable to return to the UK to live post-Brexit and that adds to the detrimental effect of extradition felt by [him]".

8. Four issues have been raised on this appeal, all of them relating to the Article 8 analysis. Two of them are issues to which Sir Ross Cranston made reference when he granted permission to appeal. One concerns fugitivity. The other concerns seriousness of the offending and a putative sentence for equivalent conduct in this country. Another issue, advanced in Mr Seifert's skeleton argument and orally, relates to the Rogers Report. A final issue, advanced orally, focuses on the passage of time back to 29 January 2016. Mr Seifert submits that these features of the case mean, individually or cumulatively: that the Judge's approach was "wrong"; that this Court should revisit and re-evaluate the Article 8 compatibility of extradition; and that this Court's conclusion should be that extradition is incompatible with the Appellant's Article 8 rights.

The Rogers Report

9. I start with this issue. Under a heading "Psychological report of Graham Rogers", there is a section of the Judgment containing this description by the Judge of the evidence. The Appellant is identified as "the RP" (requested person) and "Mr Ristin", and the Respondent is identified as "the RS" (requesting state):

> ***27. The RP relies on the content of an expert report provided by Mr Graham Rogers, a consultant psychologist. The relevant context is Mr Seifert's submission that his client never received appropriate treatment or support to address the adverse effects on his mental health resulting from the very severe trauma he experienced in 2010, when he was 16 years old. 28. The JA were content for the report to go before me as agreed evidence. That being said, it is of course a matter for me what weight I attach to Mr Rogers' opinions and conclusions. 29. Mr Rogers saw the RP at the offices of his solicitor on 1 December 2020, during a morning and an afternoon session. 30. Mr Rogers observes that a psychological assessment of the RP was undertaken while he was recovering from his injuries. I have been provided with a translation of the relevant report, by Toma Voiculescu, dated 14 December 2010. It indicates that the RP was anxious, depressed and suffering from post-traumatic stress and feelings of social isolation. It concludes that the RP's experience may lead "to the development of a psychosis as long as he follows no specialized psychotherapeutic recovery treatment." 31. I understand it to be uncontested that Mr Ristin did not receive such recovery treatment. Mr Rogers considers that a consequence of Mr Ristin's trauma could be the development of risk taking behaviour, placing the RP at risk of making very poor judgements. Mr Rogers states, "Finally, one must also consider the neuropsychological effects, which were not addressed." 32. Mr Rogers says that Mr Ristin told him that 35% of his body had been burned. Mr Ristin also told him that since the incident he has travelled extensively and changed jobs frequently, getting bored with them. He achieved his European Baccalaureate, as stated above, and was offered a place on a course at the University of Suffolk, but he found focussing on this a struggle (and it appears never completed the course if he attended at all). Mr Ristin obtained his driving licence at the age of 18. Mr Ristin told Mr Rogers that his concentration levels are poor. 33. Mr Rogers found that Mr Ristin's cognitive abilities were as they were originally, with the exception of "executive functioning". He considers that Mr Ristin may be suffering the long term effects of brain injury sustained in the incident in 2010. Mr Rogers advises that Mr Ristin "needs a referral to a specialist neuro-clinic; initially a neuropsychologist, followed by a neurologist. A neurologist would begin by interviewing Mr Ristin, but would not immediately find very much on the surface. In my view, a neuropsychologist via testing might find more. My results would form a baseline, from which they can extend the assessment. This would provide the neurologist with good quality background information, upon which they would build. It is highly likely, based on my experience, at some stage in the near future the neurologist would provide a brain scan to look for any obvious traumas. If something were to be found, treatment options could be considered to provide Mr Ristin with the best chance of sustaining an independent and fulfilled life." 34. Mr Rogers also criticises the psychologist in Romania for undertaking personality assessments, when in his view executive functioning ought to have been the focus of attention. He says that: "Problems with executive functioning can affect mental health, such as depression, anxiety, obsessive compulsive behaviour, and inattention and impulsivity. They also affect daily functioning." Mr Rogers***

> ***suspects that the RP's functioning may have deteriorated since he achieved his good results in his Baccalaureate, but this remains to be proved.***

10. This section of the Judgment then contained the following by way of commentary and conclusion:

> ***35. Ultimately, with respect to Mr Rogers, his report says little that is surprising. One would expect there to be mental health consequences from the sort of horrific experience Mr Ristin unfortunately went through at the age of 16. I accept too that Mr Ristin may have undergone a deterioration in executive functioning to some extent. On the other hand, it is apparent that Mr Ristin's health has not been so impaired that it has prevented him from attaining his Baccalaureate, starting a new life in the UK and thereafter finding employment and being fully self-sufficient, financially and otherwise. He has done all this without seeking medical or psychiatric help or therapy. It would not be fruitful for me to speculate about what a neuropsychologist or neurologist might or might not find in the event of any future assessment of the RP.***

11. In the later section of the Judgment addressing Article 8, the Judge recorded Counsel's "submissions" as including these:

> ***61. … Mr Seifert … suggests that since the serious accident in 2010, Mr Ristin has not received the treatment he should have had to maintain and keep track of his health. This has led him to 'self-medicate' through alcohol and drugs. The offences occurred in that context, and they are the summit of his offending. Mr Seifert relies on Mr Rogers' uncontradicted opinion. Mr Seifert says that if he had been sentenced in this country, Mr Ristin would have had the benefit of an assessment by the probation service and probably from an appropriate medical practitioner too… 62. … Mr Hyman refers to the presumption that member states of the EU will provide appropriate medical care to extraditees but, in any event, he says that there is no clear diagnosis of any condition in Mr Rogers' report…***

12. The Judge went on to identify this, as among the 'balance sheet' "factors militating against extradition":

> ***67. Against extradition, I find that there are the following factors: … (iii) The extradition offences … may well, at least in part, relate to the dreadful trauma the RP suffered in 2010; the RP may well continue to suffer from undiagnosed mental health or neurological problems.***

In describing his 'decision' on Article 8, the Judge said this:

> ***69. The RP has no diagnosed illness or condition that has any real relevance to the Article 8 balancing exercise.***

13. Mr Seifert submits that the Judge was "wrong" (at §69) to characterise the Rogers Report as involving nothing of "relevance" ("no diagnosed illness or condition of any real relevance to the Article 8 balancing exercise"); that the Judge was "wrong" not to recognise as having "real relevance", from the Rogers Report, the assessed deterioration in executive functioning, the ongoing effects of the incident and the trauma relating to it, and the absence of treatment; and that the Judge was "wrong" in identifying 'balance sheet' factors (at §67), which should have included not just what was speculative and absent ("undiagnosed mental health or neurological problems") but also what was evidenced and present (the executive functioning deterioration and ongoing effects).

14. I cannot accept these submissions. In my judgment the Judge was not 'wrong" in any of these respects. The Judge had regard to "all the circumstances" (§70). He had conscientiously and fairly set out the evidence from the Rogers Report (§§30-34). He

thought carefully about how this evidence could be a feature of significance in the balancing exercise. He recorded the key submissions made (§§61-62). The Judge, entirely appropriately, asked himself whether there was any "diagnosed illness or condition that has any real relevance to the Article 8 balancing exercise" and unassailably concluded that there was not (§69). The Judge counted as a factor in the Appellant's favour the possibility of the Appellant continuing to suffer from "undiagnosed" mental health or neurological problems (§67(ii)). That was not speculating. The Judge had earlier recorded that it would "not be fruitful for me to speculate about what a neuropsychologist or neurologist might or might not find in the event of any future assessment" (§35). The Judge was not speculating. Rather, this was a fair and even-handed acknowledgment, counting in the Appellant's favour, of the information gap (§33) suggested by Mr Rogers. As it happens, that information gap has been closed and it is now known – from an investigation for which this Court extended the representation order – that there is no "undiagnosed" neurological condition. The Judge had expressly recorded as "uncontested' (§31) that the Appellant "did not receive" the "recovery treatment" which had been identified in the December 2010 report (§30). The Judge fairly included as a factor in the Appellant's favour, linked to the index offending, that: "The extradition offences … may well, at least in part, relate to the dreadful trauma the RP suffered in 2010" (§67(ii)). The Judge had earlier expressly accepted the "mental health consequences" of the "horrific experience" when aged 16 (§35); and that the Appellant "may have undergone a deterioration in executive functioning to some extent" (§35). But the Judge made perfectly fair points about it being apparent that there had been no health impairment preventing the Appellant from attaining his baccalaureate starting his new life in the UK in finding employment, being fully self-sufficient financially and otherwise, and all without seeking medical or psychiatric help or therapy (§35). The Judge did not lose sight of the circumstances to which he referred. It was open to him to identify the 'balance sheet' as he did and describe the diagnosed and undiagnosed conditions in the way that he did. I can find nothing "wrong" in the approach for analysis contained in the Judge's reasons.

Seriousness/putative domestic sentence

15. The Judge recorded (at §61) that Mr Seifert had submitted: "that in this country the RP would not have received a custodial sentence for the drink driving offending and that in such circumstances this is one of those rare occasions when it is appropriate for me to have regard to that disparity (see Celinski at §13(iii))". He recorded (at §62) Mr Hyman's response: "that I should not 'go down the road' of considering domestic sentencing practice, contrary to the usual approach". In his Article 8 'balance sheet' the Judge included (at §66(iv)) as a factor "in favour of extradition" that: "The outstanding sentence is not inconsiderable and reflects repeated offending during the currency of a suspended sentence". He then included (at §67(v)) as a factor "militating against extradition" that: "The offences are not of great seriousness". Another such factor (at §67(ii)) was that: "The extradition offences occurred when the RP was young …" In his "Decision on Article 8" the Judge said: "regarding the seriousness of the offending, each EU state is entitled to set its own sentencing regime. It is not for me to second guess that policy or substitute my own view. The fact that it was repeated offending during a suspended sentence, the consequences of which the RP sought to escape by fleeing to the UK, weighs heavily in favour of extradition being proportionate". I will need to return to "sought to escape by fleeing to the UK" when I consider fugitivity.

16. Mr Seifert submits that the Judge was "wrong" to record as a submission (at §61), but not then to include as a factor weighing against extradition, that the Appellant would not be sentenced to custody for equivalent offending in the UK. Mr Seifert's premise, that there would be no custodial sentence for either the first or a second offence, was based on the Sentencing Guideline on excess alcohol (drive/attempt to drive). In his oral submissions, Mr Seifert encapsulated his argument as this proposition: in any case where the application of domestic sentencing guidelines would lead to the conclusion that a requested person would not have been the subject of a custodial sentence (including a suspended sentence) for equivalent offending here, that must be a relevant factor against extradition, for inclusion within the Article 8 balancing exercise.

17. I cannot accept these submissions. The suggested proposition is not an applicable principle of law. I can find nothing "wrong" in the Judge's approach. There was no misappreciation of any point of substance. The factors in the 'balance sheet' counting against extradition (at §§67(ii) and 67(v)) were entirely apt for inclusion. What the Judge said (at §68) was entirely orthodox: that, regarding the seriousness of the offending, each EU state is entitled to set its own sentencing regime and that it was not for him to second-guess that policy or substitute his own view. The factor in the 'balance sheet' (at §66(iv)) was also entirely apt: the Judge was right to record that the outstanding sentence was not inconsiderable, and that it reflected repeated offending during the currency of a suspended sentence. That was a theme to which he returned (at §68). This was no error of approach.

18. As the Judge recorded (§61), Mr Seifert's argument arose out of Celinski §13, especially at §13(iii). I will set Celinski §13 out in full:

> ***[I]n relation to conviction appeals: (i) The judge at the extradition hearing will seldom have the detailed knowledge of the proceedings or of the background or previous offending history of the offender which the sentencing judge had before him. (ii) Each Member State is entitled to set its own sentencing regime and levels of sentence. Provided it is in accordance with the Convention, it is not for a UK judge to second guess that policy. The prevalence and significance of certain types of offending are matters for the requesting state and judiciary to decide; currency conversions may tell little of the real monetary value of items stolen or of sums defrauded. For example, if a state has a sentencing regime under which suspended sentences are passed on conditions such as regular reporting and such a regime results in such sentences being passed much more readily than the UK, then a court in the UK should respect the importance to courts in that state of seeking to enforce non-compliance with the terms of a suspended sentence. (iii) It will therefore rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been. As Lord Hope said in HH at §95 in relation to the appeal in the case of PH, a conviction EAW: "But I have concluded that it is not open to us, as the requested court, to question the decision of the requesting authorities to issue an arrest warrant at this stage. This is their case, not ours. Our duty is to give effect to the procedure which they have decided to invoke and the proper place for leniency to be exercised, if there are grounds for leniency, is Italy." Lord Judge made clear at §132, again when dealing with the position of children, that: "When resistance to extradition is advanced, as in effect it is in each of these appeals, on the basis of the article 8 entitlements of dependent children and the interests of society in their welfare, it should only be in very rare cases that extradition may properly be avoided if, given the same broadly similar facts, and after making proportionate allowance as we do for the interests of dependent children, the sentencing courts here would nevertheless be likely to impose an immediate custodial sentence: any other approach would be inconsistent with the principles of international comity. At the same time, we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner***

> ***release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence).”***

19. Celinski §13(iii) explains that it will “rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been”. The reasons for that flow (the word at the start of §13(iii) is “therefore”) from §§13(i) and (ii). It is immediately preceded by §13(ii), which emphasises: that “each Member State is entitled to set its own sentencing regime and levels of sentence” and “provided it is in accordance with the Convention, it is not for a UK judge to second guess that policy”; that “prevalence and significance of certain types of offending are matters for the requesting state and judiciary to decide”; and that “if a state has a sentencing regime under which suspended sentences are passed … much more readily than the UK, then a court in the UK should respect the importance to courts in that state of seeking to enforce non-compliance with the terms of a suspended sentence”. This reasoning is directly applicable and the Judge was plainly entitled to adopt it. The description of suspended sentences being passed, under the sentencing regime of the requesting state, “much more readily than the UK”, is a clear reference to the scenario where an equivalent case here would not receive a custodial sentence including a suspended sentence. When the extraditing court comes to consider extradition – because the suspended sentence has been activated – the approach is to “respect” the sentence and its activation. This reasoning does not in my judgment accommodate Mr Seifert’s proposition. Put another way, if Mr Seifert’s proposition were correct, this passage in Celinski would have read very differently. Then there is Celinski §13(iii), which specifically quotes HH at §132 where Lord Judge said: “It … does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence: however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence)”. That statement is specifically addressing the question when the fact that “the sentencing court in this country would not order an immediate custodial sentence” would “become relevant”. It gives an example – of a case which would involve a “non-custodial sentence” if sentenced “here” – where that feature would “become relevant”. The example is a special case involving the welfare of a child. Lord Judge did not say, as he would have said if Mr Seifert’s proposition were correct, that it will always be “relevant” that “the sentencing court in this country would not order an immediate custodial sentence”.

The passage of time from 29.1.16

20. This was the new issue raised in oral submissions. The context is that: (a) there was no argument before the Judge, nor is there before me, that it would be oppressive or unjust to extradite the Appellant by reason of the passage of time (section 14 of the 2003 Act); but (b) the passage of time is a recognised feature of Article 8 ECHR analysis. Mr Seifert accepts that he did not mount an argument based on the passage of time, back to 29 January 2016, before the Judge. He now submits that this is a relevant passage of

time which can materially affect the Article 8 analysis. He emphasises that a further 20 months of further time is now lapsed. But that cannot begin to be a reason for not having raised the point below, if it were a good one. If the point were a good one, there would have been a relevant, five year passage of time at the time of the hearing before the Judge. I will put that to one side and consider the point on its legal merits. But I do so bearing in mind that there can be no possible criticism of the Judge for not addressing this point when it was not raised as a relevant point.

21. Mr Seifert locates his argument as arising out of Polish Judicial Authority v Celinski [2015] EWHC 1274 (Admin) [2016] 1 WLR 551 at §63 (explaining that "delay can be a factor"), read with H (H) v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25 [2013] 1 AC 338 §46 ("There was some delay between the offences themselves and the bringing of the … prosecutions"; "the overall length of the delay is relevant to the Article 8 question"; and the circumstances did "not suggest any urgency about bringing the appellant to justice"). Mr Seifert submits that the Article 8 balance is materially affected by taking account of the delay in the Romanian criminal processes, going back to the date of the first offending on 29 January 2016. I have found this a perplexing argument in the circumstances of the present case. The first drink-driving offence was in January 2016. But by October 2016 the Appellant had been convicted and sentenced for that offence. The sentence was the 12 month suspended sentence. It took effect the following month. I cannot see what material point can possibly arise from a focus on January 2016. Nor can the delay between the date of the suspended sentence (20 October 2016) and the second offence (20 January 2017) possibly be of significance or weight. It is simply a function of the period of time in which the Appellant was the subject of a suspended sentence which he had not yet breached. Suppose there had been a greater period of time between the suspended sentence and a second offence which breached it. So what? I cannot see how any of this can possibly constitute a period of delay on the part of those concerned with the Romanian criminal process.

22. A better, but more modest, argument would focus on the period between the offending on 20 January 2017 and the conviction at court in the Appellant's presence on 16 May 2019. That is 28 months. Mr Seifert relies on that, as part of his arguments under this issue. As he points out, it is a period unexplained in the evidence. On the other hand, nor has any point ever been raised in relation to it, until Mr Seifert took to his feet before me. In my judgment, now that the point has been raised, it cannot fairly be said that this case has involved an absence of "urgency about bringing the Appellant to justice". It is necessary to look at the picture as a whole. That was the approach in H (H) at §46. I have addressed the passage of time prior to 20 January 2017. There was no lack of promptness or urgency. As to the passage of time after 16 May 2019, the appeal was dealt with promptly (10 October 2019), the decree of imprisonment was immediate (the same day), the EAW was within 7 days (17 October 2019) and the Appellant was intercepted and arrested on 19 June 2020. I cannot accept that the picture as a whole reflects an absence of urgency. But I will factor in the passage of time overall, and the passage January 2017 to May 2019 specifically, when I come to consider the overall position.

Fugitivity I

23. I turn to the issue of fugitivity. In this part of this judgment I will set out what I see as the correct analysis. Under the heading "fugitivity" the Judgment began by recording (at §63) that: "As both Counsel agree, the issue of fugitive status is important because such a finding weighs heavily in the balance, in favour of extradition". So far as the law is concerned, the Judge identified the relevant authorities: Wisniewski v Poland [2016] EWHC 386 (Admin) [2016] 1 WLR 3750; Pillar-Neumann v Austria [2017] EWHC 3371 (Admin); and De Zorzi v France [2019] EWHC 2062 (Admin) [2019] 1 WLR 6249. He also identified this as the core principle:

> ***64. A person who has knowingly placed himself beyond the reach of a legal process is a fugitive. It is for the requesting state to establish fugitive status to the criminal standard. It must be shown that the requested person deliberately and knowingly placed himself beyond the reach of the relevant legal process.***

Mr Seifert accepts that the Judge identified the relevant case-law and identified the correct core principle.

24. The Judge found that the Appellant left Romania in August 2019 as a fugitive. Mr Seifert submits that the Judge clearly and materially factored his adverse finding of fugitivity into the Article 8 'balance sheet' and 'balancing exercise'. I agree with that submission. The Judge had already (at §63) described fugitivity as "a finding [which] weighs heavily in the balance, in favour of extradition". He had also (at §62) recorded this as the Respondent's position: "Mr Hyman points to the strong public interest in honouring extradition arrangements. He asserts that the RP is a fugitive, which means that very strong counterbalancing factors are required before extradition could be disproportionate (see §39 of Celinski)". In the Article 8 'balance sheet' the Judge referred (§66(i)) to the "very high public interest in ensuring that the UK is not regarded as a 'safe haven' for fugitives from justice". In the 'Decision on Article 8' (at §68) he said this was "repeat offending during a suspended sentence", whose "consequences [the Appellant] had sought to escape by fleeing to the UK", which he said "weighs heavily in favour of extradition being proportionate". Mr Hyman accepted, on reflection, that if this Court concluded that the finding of fugitivity was wrong, it would follow that this Court should revisit the Article 8 balancing exercise and revisit the outcome. In my judgment, he was right to do so.

25. The platform for the Judge's finding of fugitivity were his findings arising out of the evidence. So far as the facts of the present case are concerned, the Judge – having earlier discussed the evidence of the Appellant – made a series of findings. The numbering in square brackets is mine and I will cross-refer to these as findings [i], [ii] to [vi]. The Judge found as follows:

> ***65. … Mr Ristin accepts that [i] he chose to leave Romania while his appeal was ongoing, in the knowledge that if unsuccessful he would have to serve immediate custody. He spoke of [ii] what he understood to be his chances of success on appeal as 'hoping for a miracle.' He said [iii] he has not returned to Romania because he wanted to sort things out from England. Against that backdrop, I am sure that [iv] Mr Ristin came to England, in approximately August 2019, to avoid the prison sentence that hung over him. [v] He did so intending to avoid the reach of the relevant legal process… [vi] Mr Ristin has taken positive steps to evade the authorities in the requesting state.***

26. Mr Seifert accepts, with one exception, that these are properly to be characterised as "findings of fact", which were open to the Judge, and that he cannot (and does not seek to) impugn on this appeal. The exception is finding [vi]. Mr Seifert singles out that

finding and submits as follows: that [vi] is not a finding "of fact"; and that (however it is characterised) it was "wrong" in light of the evidence as a whole and the law correctly understood. He submits that [vi] was the Judge's characterisation, in the application of the legal test (at [64]) to the findings [i] to [v]; that the characterisation of the Appellant having "taken positive steps to evade the authorities of the requesting state" was a misapplication of the law. He submits, in any event, that the Judge's finding of fugitivity was "wrong", when viewed against the evidence and the authorities.

27. Ultimately, as I saw it, Mr Seifert's arguments on non-fugitivity turn on five features, present in this case. (1) First, when the Appellant left Romania in August 2019 to come to the UK he was "returning" here (cf. De Zorzi §57), having first come to the UK in February 2017. (2) Secondly, when the Appellant was convicted and sentenced on 16 May 2019, he was not the subject of any domestic warrant requiring that he surrender to custody. That was because he had an extant right of appeal, which he subsequently pursued. (3) Thirdly, that when the Appellant left the Romanian court on 16 May 2019, he was the subject of no restriction on his leaving court or on his leaving Romania. That is equivalent to him being "free to leave" (cf. De Zorzi §50). It is equivalent to having "the court's permission" (cf. De Zorzi §63) to leave Romania. That is because, had a Romanian judge been asked on or after 16 May 2019, the judge would have confirmed that the Appellant was 'permitted to leave Romania if he wished to do so'. (4) Fourthly, that when and after the Appellant left Romania in August 2019, he was pursuing a right of appeal from the UK (cf. De Zorzi §58), as he was entitled to do. (5) Fifthly, that the Appellant has declined to volunteer to return to Romania and to surrender under these extradition proceedings (cf. De Zorzi §§59-60).

28. As to feature (3), Mr Seifert accepts – rightly – that there is no general principle that a requested person must have left the requesting state territory in breach of an extant restriction on his doing so, or in breach of an extant condition requiring that he notify an address. Mr Seifert accepted that, in principle, a requested person may be a fugitive having left the requesting state under, and in breach of, no such restriction or condition. As to feature (2), Mr Seifert also accepts – rightly – that a requested person may be a fugitive as a consequence of action leaving a requesting state, albeit that there was at the time of leaving no crystallised duty to surrender to custody. That means the requested person left as a fugitive even though they were not at that stage "unlawfully at large".

29. I will describe the three cases in the trilogy. Wisniewski was a case about suspended sentences and their subsequent activation. The requested persons were found to have left the requesting state in circumstances which involved their knowingly preventing compliance with the conditions of extant suspended sentences. Specifically, that was because they left in breach of a condition requiring notification of an address (§§64 and 69) or other conditions (§66). The Divisional Court decided that they left as "fugitives" notwithstanding that they only became "unlawfully at large" later when the suspended sentences were activated (§53). They were not aware of the activation. But their conduct in leaving met the core principle of action knowingly placing themselves beyond the reach of legal process (§59). Pillar-Neumann was a case about declining to answer a summons to travel to, and appear in, the requesting state. The requested person had been in the UK when they first became aware of the legal proceedings against them in the requesting state. They had chosen to remain here and subsequently resisted extradition. The Divisional Court decided that this conduct did not constitute them a

fugitive. They were not "evading arrest" (§68) or knowingly placing themselves beyond the reach of legal process (§70). Were it otherwise, the logic would be that any requested person not submitting to arrest, by returning to the requesting state, would be a fugitive (§72). De Zorzi was a case about returning home with permission to leave. The requested person's action in leaving France was "simply returning home" (§57), "with the permission of the court" (§55). The Divisional Court concluded that they could not in law be regarded as a "fugitive". The requested person had been present in court at her trial in France in 2001 (§50), had then returned home to the Netherlands after being told by the court that she was "free to leave France" (§50), had then been notified of her conviction and sentence (§57), and unsuccessfully appealed (§58), and had refused to answer the summons of the French court (§§59-60). All three of these cases recognise the core principle which asks whether the requested person has acted knowingly to place themselves beyond the reach of the legal process (Wisniewski §59, Pillar-Neumann §70, De Zorzi §48); together with a recognition that the classic situation in which an individual is a fugitive is where they have fled the country, concealed their whereabouts or evaded arrest (Wisniewski §59, Pillar-Neumann §§62, 64, De Zorzi §46ii).

30. In the present case, based on his findings of fact, the Judge concluded that the positive steps to evade the authorities in the requesting state, in the context of what the Appellant knew and was facing, were sufficient to mean that he was a fugitive. I do not accept that the Judge was "wrong" in finding [vi] that the Appellant had "taken positive steps to evade the authorities in the requesting state"; nor that the Judge's finding of fugitivity was "wrong". The Judge found sufficient factual indicators in the knowingly evasive actions of the Appellant, who to his knowledge had been convicted and sentenced, to constitute him as having evaded the authorities. It is true that he was going back to the UK which had previously been his home. It is true that there was no legal obligation imposed on him to stay in Romania. But an individual can be a fugitive by returning to a country where they have previously been living. And an individual can be a fugitive by leaving a country, notwithstanding that no legal obligation to stay has been imposed upon them. Indeed, the classic instance of "evading arrest" need not arise in the context of any obligation having been imposed. I think that, in De Zorzi, the idea of having "left the court with the permission of the court" (§55) was something distinctive and positive, more than simply the absence of a restriction on leaving the country. In the present case, on 16 May 2019 the Appellant was present when he was convicted. He knew about his sentence and that he faced serving it, subject only to an appeal. He came to the UK three months later in August 2019, returning here, to pursue an appeal from here. These circumstances could properly be characterised as falling squarely within the ambit of the classic character of fugitivity: knowing and evasive relocation. This fits with the basic idea of fugitivity: action which is knowingly evasive of criminal process and undermines the ability of the individual convincingly to complain about delay in their pursuit by the requesting authorities.

31. In De Zorzi at §63, Garnham J (for the Divisional Court) said this:

> ***[H]ad the judge found as a fact that the appellant had fled back to Holland during the course of the French proceedings and without the court's permission; or was told on 28 June 2001 at the French court that she had been convicted and sentenced, so that she knew that that was the position when she returned to the Netherlands, I would have held that the judge's conclusion on fugitive status was correct …***

That passage, as Mr Seifert rightly points out, was obiter. But I find it assists me. Mr Seifert's logic means I would have to treat "without the court's permission" as meaning "in breach of a condition prohibiting her from leaving"; and it would mean I would have to treat "convicted and sentenced" as meaning "convicted and sentenced and required immediately to attend prison". I think Garnham J meant what he said and was not incorporating these other features. If Ms De Zorzi had not been given "the court's permission", and had been told she had been "convicted and sentenced", she would have had all five of the features emphasised in the present case by Mr Seifert.

32. For all these reasons, the Judge's conclusion on fugitivity was in my judgment legally correct and certainly open to the Judge on the findings of fact that were made, in light of the authorities which he considered and to which he referred. In the next section, I will discuss the approach which would arise if that conclusion were wrong.

Fugitivity II

33. I am going to conduct an alternative analysis. I will assume in the Appellant's favour that the five features identified by Mr Seifert and in law sufficient to undermine as "wrong" the finding that the Appellant left Romania in August 2019 as a fugitive. Mr Hyman submitted that, even if that were correct, it would not avail the Appellant in the circumstances of the present case. That is in my judgment an important submission and I am going to examine it, on the premise that the Judge and I got the characterisation of fugitivity wrong. In doing so, I have the following well in mind: that fugitivity is capable of changing the Article 8 balance significantly (see De Zorzi §66); that fugitivity informs the "safe haven" principle which is a factor in favour of extradition, namely "the public interest in discouraging persons seeing the United Kingdom as a state willing to accept fugitives from justice" (see Wisniewski §47(2)), and that "a process of sub-categorisation involving 'quasi-fugitives' and 'fugitives not in the classic sense' is unlikely to be helpful" (see Wisniewski §59).

34. I think the Article 8 context is important. In the context of section 14 arguments about whether it is unjust or oppressive to extradite the requested person by reason of the passage of time, the question whether the individual is a fugitive really operates as an on/off switch. Leaving aside exceptional circumstances, if the requested person is a fugitive, they will not be able to rely on section 14 at all (see Wisniewski §§39, 58, Pillar-Neumann §61, De Zorzi §46vii). The logic is straightforward. You cannot complain about injustice or oppression from the passage of time, based on circumstances which have occurred during that passage of time, if the passage of time can be laid at your own door because you knowingly placed himself beyond the reach of the authorities of the requesting state. Because fugitivity operates as an on/off switch in the context of section 14, questions of sub-categorisation involving 'quasi-fugitives' and 'fugitives not in the classic sense' is unhelpful. An on/off switch needs a bright line. In the context of Article 8 ECHR, the analysis has chosen to adopt the same concept of fugitivity. But the Article 8 analysis – including of the passage of time – is a more contextual and nuanced balancing framework of considerations, applying a human rights protection standard. There is no on/off fugitivity switch. An Article 8 argument may succeed even though the requested persons is a fugitive. An Article 8 argument may fail even though the requested person is not a fugitive. Fugitivity will be relevant when considering passage of time, including circumstances which have arisen during that time. But the passage of time will remain a relevant consideration in the

Article 8 balancing exercise even where the individual is a fugitive. In Article 8 terms, a finding of fugitivity can dilute the weight which can properly be given to private and family life considerations which have arisen as a function of the passage of time. A finding of fugitivity can also fortify the weight to public interest considerations in favour of extraditing the requested person. The "safe haven" consideration is at its strongest in the context of fugitives; but there can be a "safe haven" public interest consideration where the requested person is seeking a shield from facing their responsibilities. The facts and circumstances relating to the requested person having left the territory of the requesting state and having come to the UK may give rise to all sorts of relevant features which can appropriately be considered in the context of an Article 8 proportionality assessment. In the Article 8 context, one way of expressing this nuance and subtlety might be to countenance difference "senses" or "degrees" to which there has been conscious evasion of responsibility. That is a function of an intense focus on the facts. I also think, viewed in this way, that attractions can lie the approach to Article 8 discussed in Wisniewski at §42 (from the judgment of Irwin J in Herman v Poland [2015] EWHC 2812 (Admin) at §22), which "in the context of Article 8", accepted that "even if the requested person was not a fugitive, he was 'close to it because of his failure to comply'".

35. I add this, at the level of principle. Given that Article 8 and section 14 share the same concept of fugitivity, it is important to adopt a pure and logical approach. In an Article 8 case, that would involve positing the question of fugitivity by supposing facts relevant to a section 14 challenge. De Zorzi was a section 14 case where there had been a very substantial passage of time. Fugitivity would have been the on/off switch precluding reliance on section 14. For as long as the same concept is borrowed in Article 8 cases, the purity of the analysis calls for lateral thinking to guard against distortion.

36. Returning to the present case, let it be supposed that the correct analysis is that the Appellant was not in law a fugitive, and had left Romania in circumstances in which he was free to do so, had not breached any obligation to notify change of address because there was no such obligation, and pursued his appeal from the UK and then declined voluntarily to return to Romania, resisting these extradition proceedings. The question is whether that makes a material difference to the Article 8 analysis in the circumstances of the present case. The Judge's other findings of fact [i] to [v] are all relevant and all unassailable. The Appellant had chosen to leave Romania while his appeal was ongoing, in the knowledge that if unsuccessful he would have to serve immediate custody. He had understood his chances of success on appeal as 'hoping for a miracle'. He had then not returned to Romania because he wanted to sort things out from England. He had come to England to avoid the prison sentence that hung over him. He did so intending to avoid the reach of the relevant legal process. In the nuanced assessment of Article 8 proportionality, it must count in the Appellant's favour if these circumstances were not enough to make him a fugitive. He left in breach of no condition. He was not required to stay in Romania. He did not breach any duty to notify an address. On this alternative analysis there would be no finding of fugitivity to weigh heavily in the balance, in favour of extradition. This is not a case of a "safe haven" for a "fugitive" from justice. He was not "fleeing to the UK" as something which "weighs heavily" in favour of extradition. However, the fact is that the Appellant left Romania with his 'eyes wide open'. He knew he had been convicted in his presence. He knew he was facing an immediate custodial sentence including activation of the suspended sentence. He knew that 15 months was on the cards. He had filed an appeal and was

hoping 'for a miracle'. He knew that that appeal would imminently be considered. Within two months of returning to the UK in August 2019 he knew, in October 2019, that his appeal had been dismissed. By June 2020 he had been arrested and was the subject of these extradition proceedings. Meanwhile the authorities had acted promptly. The EAW had been issued within 7 days of the dismissal of the appeal and the issuing of the decree of imprisonment. I agree with Mr Hyman that these circumstances are relevant in the Article 8 proportionality balance. The circumstances of the case would look different if they were not so. Even the "safe haven" feature relied on by the Judge would properly be identified in the more limited and diluted sense that it is in the public interest in the United Kingdom should not be a safe haven for those who seek to avoid facing up to their responsibilities under the criminal processes of the requesting state. There was, moreover, in findings [i] to [v] no misappreciation by the Judge of any factual aspect of the case. The Judge did not, for example, misappreciate that the Appellant had left Romania in breach of some requirement to stay there or in breach of some condition to notify change of address. So far as the facts and circumstances of this case are concerned there was no misunderstanding on the part of the Judge at all. I accept that the Judge weighed the finding of fugitivity heavily. I accept that his balancing exercise would have been different had he found that the Appellant was not in law a fugitive. However, had he answered the Article 8 question correctly, he would still have needed to consider the circumstances relevant to the topic of fugitivity. I will factor this in to my consideration of the overall outcome.

Overall outcome

37. I turn finally to consider the overall outcome. I have in the event concluded that there was nothing wrong in the Judge's reasoning on any of the four issues advanced by Mr Seifert. But I have also said that, in the circumstances of the present case, to revisit the overall evaluative outcome by considering the passage of time and specifically between 20 January 2017 (the second drink-driving offence) and 16 May 2019 (date of the conviction and sentence). I have also considered the alternative position if the Appellant's conduct was not in law such as to constitute him a fugitive. Having regard to these features, and in light of the other circumstances of the case, I still could not accept that the Article 8 outcome was "wrong". I do not accept that the Judge ought to have answered the article 8 question differently from the way that he did. I have well in mind, as did the Judge, the horrific experience of the explosion when the Appellant was aged 16, together with its implications. However, the Appellant committed the first drink-driving offence aged 22 in 2016; and then two months into the effective two-year suspended sentence he committed the second drink-driving offence. The overall custodial sentence, with the two-thirds discount of the second sentence, must attract the respect of the extraditing court, notwithstanding the fulfilment of the 300 hours of unpaid work. That condition was met. The condition not to reoffend during the suspension period of two years was not. The Appellant does not have a family life in the UK. He had only been back here for two months when, to his knowledge, he was wanted to serve his sentence of imprisonment in Romania. The authorities tracked him down on the EAW, in the context of arresting him on what turned out to be another driving offence, as well as possession of a Class A drug. Meanwhile, he had committed another offence of driving without a licence and document forgery in Germany in July 2019. Notwithstanding the Rogers Report, notwithstanding his length of time in the UK with his work and private life ties and his lack of further offending since June 2020, in

my judgment is that the public interest considerations in favour of extradition decisively outweigh those which in combination are capable of counting against it.

Conclusion

38. For all these reasons, the appeal is dismissed.