Neutral Citation Number: [2023] EWHC 439 (Admin)

Case No: CO/1710/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2023

Before:

LORD JUSTICE HOLROYDE
(Vice-President of the Court of Appeal, Criminal Division)

MR JUSTICE JAY

- -

Between:

SUCEAVA DISTRICT COURT, ROMANIA	**Appellant**
- and -	
MARIAN GURAU	**Respondent**

- -
- -

Clair Dobbin KC and David Ball (instructed by **Crown Prosecution Service, Extradition Unit**) for the **Appellant**
Mark Summers KC and Hannah Hinton (instructed by **Coomber Rich**) for the **Respondent**

Hearing dates: 20 October, 2022

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Approved Judgment

This judgment was handed down remotely at 10:30am on 2 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Holroyde:

1. The appellant, the Suceava District Court in Romania, sought the return of the respondent Marian Gurau pursuant to a European Arrest Warrant ("EAW") to serve a total sentence of 3 years 5 months' imprisonment. In a judgment dated 6 May 2021 District Judge (Magistrates' Courts) Clews ("the DJ") found that there was compelling evidence of a likely breach of speciality (also referred to as "specialty": hence the different spellings which appear in some of the quotations which follow). On that basis, he held that extradition was barred by s11(1)(f) of the Extradition Act 2003 ("the Act") and ordered the discharge of the respondent. With the leave of Jay J, the appellant appeals against that decision. The respondent seeks to cross-appeal.

2. Two issues arise for consideration: was the DJ wrong to find that extradition was barred by speciality; and if he was, is extradition in any event impermissible on the grounds which the respondent seeks to raise by way of cross-appeal, namely abuse of process, and/or breach of his rights under articles 3 and/or 5 of the European Convention on Human Rights ("art. 3/ art.5")? Consideration of that second issue requires the court to decide whether it has any jurisdiction to hear a cross-appeal.

3. I express at the outset my gratitude to all counsel – Ms Dobbin KC and Mr Ball for the appellant, Mr Summers KC and Ms Hinton for the respondent, none of whom appeared below – for their written and oral submissions. Following the provision to counsel of a draft of the court's judgments, a point arose which led the court to direct further written submissions. Those further submissions also were most helpful, and I am grateful for them.

The criminal proceedings in Romania:

4. The respondent is now 46 years old. The EAW related to five offences of which he was convicted by the District Court in Suceava. The earliest in time were three offences of tax evasion, committed between February 2007 and 2010, which involved failures by the respondent to make required fiscal declarations in relation to a company. In 2013, suspended sentences of a total of 8 months' imprisonment were imposed for those offences. Thereafter, in March 2014, the respondent was paid to drive 6 migrants, and a people smuggler, from Suceava to the Hungarian border, thereby committing offences of migrant trafficking and supporting an organised crime group for the purpose of trafficking in migrants.

5. By his commission of those offences, the respondent was in breach of the suspended sentences imposed in 2013. The Suceava court revoked the suspension of those sentences, and aggregated the sentences for the 2014 offences. This resulted in a total sentence for the five offences, made final on 28 November 2018, of 3 years 5 months' imprisonment.

6. The respondent had fled Romania and come to the United Kingdom in 2015. The whole of his sentence remains to be served.

7. The EAW was issued on 17 December 2018 and certified by the National Crime Agency on 10 January 2019. The boxes were ticked for offences of participation in a criminal organisation, trafficking in human beings and fraud. The respondent was arrested on 14 January 2020 and was on conditional bail throughout the extradition

proceedings. Because of the date of his arrest, the unamended provisions of the Act, the Council Framework Decision 2002/584/JHA on the European arrest warrant, and the surrender procedures between Member States of the European Union continue to apply to this appeal.

8. In addition to the five offences dealt with by the court in Suceava, and covered by the EAW, an indictment charging the respondent with a further offence of tax evasion was issued on 29 March 2019 in the Vaslui Tribunal. For convenience, I shall refer to this as "the Vaslui offence". In the proceedings before the Vaslui Tribunal the respondent has been represented by a Romanian lawyer of his choice, and had indicated his willingness to take part in hearings via a video link from this country.

9. Although it would have been open to the relevant judicial authority to issue an accusation EAW in relation to the Vaslui offence, that was not done. The Vaslui Tribunal did, however, seek judicial assistance from the authorities in this country in relation to whether the respondent wished to plead guilty or wished to be "judged in absentia".

The extradition hearing:

10. The respondent initially resisted his extradition on five grounds: the passage of time (s14 of the Act); speciality (s17), on the basis that the Romanian authorities were prosecuting him for a further tax evasion offence not contained in the EAW; the lack of a right to a retrial (s20); prison conditions (s21 and art.3); and his right to a private and family life (s21 and art.8). In the light of recent case law, however, he did not pursue the prison conditions issue at the hearing on 31 March 2021.

11. The DJ found that the respondent was a fugitive from Romanian justice, having left that country to avoid prosecution in the knowledge that he was in breach of the suspended sentence of 2013 and would be sent to prison. He disbelieved parts of the respondent's oral evidence, and rejected the respondent's submissions in relation to three of the challenges to extradition. Thus the only ground on which he discharged the respondent was his finding that extradition was barred by speciality.

12. In that regard, the DJ said, at paragraph 42 of his judgment –

> "S.17(1) provides that speciality is a bar to extradition "*if (and only if) there are no specialty arrangements with the Category 1 territory*." As was pointed out in *Prystaj v Poland* [2019] EWHC 780 (Admin) (at para 15) all EU countries are signatories to the European Convention on Extradition which includes a provision that extradites [sic] cannot be dealt with in the receiving countries other than for the offences for which they have been extradited. The specialty rule also appears in the Framework Decision. On the face of it, therefore, there *are* specialty arrangements and the bar cannot operate. However, that is not the end of the matter."

13. The DJ then referred to the prosecution of the respondent for further tax evasion offences. He recorded in his judgment that he had enquired during the hearing why Romania had not issued an accusation EAW in relation to the Vaslui offence, and had

been told that Romania had simply decided not to do so. He noted the submissions on behalf of the appellant relying on the principle of mutual confidence and respect, and pointing out that the Romanian authorities had been entirely open and transparent about their prosecution of the Vaslui offence. He referred to a number of cases, including *Prystaj v Poland*, *Brodziak v Poland* [2013] EWHC 3394 (Admin) and *Hilali v Spain* [2006] EWHC 1239 (Admin). He reminded himself that the burden was on the respondent to establish that his extradition was barred, and that there is a strong presumption that Member States will comply with their obligations. He added, at paragraph 46 –

> "Thus, in relation to Part 1 cases it is not at all easy to establish specialty."

14. The DJ noted from the case law that Poland and Spain had incorporated the speciality rule into their domestic law. He had not, however, been made aware that Romania had done so. He continued, at paragraph 47 –

> "That by no means establishes or begins to establish a likelihood of non-compliance but it does to an extent weaken the JA's case. It would assist their case if there could be shown to be a similar domestic law to that which exists in Poland and Spain."

15. The DJ stated that a prosecution for the Vaslui offence was in progress, with the next hearing scheduled for a date in June 2021. He noted the submission by counsel then representing the respondent that participation in the Vaslui proceedings did not amount to a waiver of the respondent's speciality rights. He accepted counsel's submission that, because the Vaslui proceedings were still ongoing, the speciality rule applied.

16. The DJ referred to s54 of the Act, which after extradition allows a judicial authority to seek consent for the requested person to be dealt with for another offence not covered by the EAW. But, he said, that was not something which could be considered at the present stage, because there had not yet been extradition of the respondent and a request for consent therefore could not be made.

17. At paragraph 55, the DJ concluded –

> "Having considered all of the available evidence I am satisfied that in this particular case there is compelling evidence of a likely breach of specialty and that in the circumstances it would be wrong to presume compliance. The presumption of compliance has been displaced by the instigation and continuation of the new prosecution in Romania."

He accordingly found that extradition of the respondent was barred by s11(1)(f) of the Act, and ordered that the respondent be discharged.

A subsequent development:

18. On 17 October 2022, shortly before the hearing of this appeal, the respondent was convicted of the Vaslui offence of tax evasion. The Vaslui Tribunal imposed a sentence of 2 years' imprisonment for that offence, but merged the sentence with the existing

sentences. In the result, the total sentence is 4 years one month's imprisonment. The court was informed that the decision of the Vaslui Tribunal is "not final", and that the respondent remains on bail.

Summary of the submissions: speciality:

19. On behalf of the appellant, Ms Dobbin KC submits that the DJ fell into error at each stage of his reasoning. She questions whether the speciality rule is engaged at all on the facts of this case, given that the respondent's participation in the Vaslui proceedings arguably amounts to waiver of his speciality rights in relation to that offence. If the rule is engaged, she submits that compelling evidence is required to displace the strong presumption that a state with which the UK has extradition relations will breach its obligations, and that the DJ was fundamentally wrong to find such compelling evidence in the mere existence of the Vaslui proceedings. In light of the principles stated in *R (Mihaylov) v Regional Prosecutions Office in Burgas (Bulgaria)* [2022] EWHC 908 (Admin), Ms Dobbin submits that the important question is whether there are practical and effective arrangements in Romania to ensure that the respondent will only be dealt with for the offences for which he has been extradited. That question has been answered in the affirmative in *Enasoaie v Romania* [2021] EWHC 69 (Admin) at [68] (a case not cited to the DJ) and again, recently, in *Viorel Nonea v Judecatoria Oradea Romania* [2022] EWHC 2217 (Admin). The DJ was therefore wrong, Ms Dobbin submits, to proceed on the basis that Romanian domestic law has not given effect to the speciality rule, and wrong to treat the fact that the Vaslui proceedings were ongoing as tantamount to a breach of speciality. She further submits that the DJ was also wrong to proceed on an assumption that Romania would not, if the respondent is extradited, make a request for consent pursuant to s54 of the Act.

20. Mr Summers KC, on behalf of the respondent, opposes the suggestion that the respondent has waived his speciality rights. He submits that the DJ was correct to regard the conduct of the Romanian authorities in relation to the Vaslui offence as inconsistent with, and a violation of, the speciality rule. He argues that the DJ was placed in a difficult position because, despite his enquiries, he was not told by the appellant precisely how Romania intended to proceed. The facts showed that Romania was actively circumventing the speciality rule, and so displaced the presumption of compliance with it. Mr Summers goes on to argue, by reference to the differing terms of article 27 of the Framework Decision and s17 of the Act, that the ongoing prosecution of the Vaslui offence was of itself a breach of s17(2). The possibility that the respondent might have a domestic remedy in Romania for that breach did not displace the DJ's duty to apply s17.

Summary of the submissions: cross-appeal:

21. Both parties submit that this court has no jurisdiction to hear a cross-appeal by the respondent. Nothing in the Act permits a cross-appeal, and the Criminal Procedure Rules make no provision for a formal process of cross-appeal. Both parties submit that the Act limits the circumstances in which an appeal may be brought, and requires an appellant to pass through the filter of obtaining leave to appeal. That structure would be lost if, in an appeal such as this, an unsuccessful respondent were free to raise any issues by way of a non-statutory cross-appeal.

Relevant statutory provisions:

22. Romania is a Part 1 territory and Part 1 of the Act accordingly applies. Where (as in this case) a judge is required to proceed under s11, he must, by s11(1)(f), decide whether extradition is barred by reason of speciality.

23. So far as is material for present purposes, s17 provides:

> "**17 Speciality**
>
> (1) A person's extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory.
>
> (2) There are speciality arrangements with a category 1 territory if, under the law of that territory or arrangements made between it and the United Kingdom, a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if
>
> (a) the offence is one falling within subsection (3), or
>
> (b) the condition in subsection (4) is satisfied.
>
> (3) The offences are –
>
> (a) the offence in respect of which the person is extradited;
>
> (b) an extradition offence disclosed by the same facts as that offence;
>
> (c) an extradition offence in respect of which the appropriate judge gives his consent under section 55 to the person being dealt with;
>
> (d) an offence which is not punishable with imprisonment or another form of detention;
>
> (e) an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;
>
> (f) an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.
>
> (4) The condition is that the person is given an opportunity to leave the category 1 territory and –
>
> (a) he does not do so before the end of the permitted period, or
>
> (b) if he does so before the end of the permitted period, he returns there.

> (5) The permitted period is 45 days starting with the day on which the person arrives in the category 1 territory."

24. Where a judge at an extradition hearing orders the discharge of the requested person, the judicial authority may appeal pursuant to s28 against "the relevant decision". By s28(3) –

> "The relevant decision is the decision which resulted in the order for the person's discharge."

25. So far as is material, s29 provides –

> "**29 Court's powers on appeal under section 28**
>
> (1) On an appeal under section 28 the High Court may –
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that –
>
> (a) the judge ought to have decided the relevant question differently;
>
> (b) if he had decided the question in the way he ought to have done, he would not have been required to order the person's discharge.
>
> (4) The conditions are that –
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the judge deciding the relevant question differently;
>
> (c) if he had decided the question in that way, he would not have been required to order the person's discharge.
>
> (5) If the court allows the appeal it must –
>
> (a) quash the order discharging the person;
>
> (b) remit the case to the judge;
>
> (c) direct him to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.

> (6) A question is the relevant question if the judge's decision on it resulted in the order for the person's discharge."

26. It is appropriate to note in passing that s105 and s106 contain corresponding provisions for an appeal against discharge at an extradition hearing in a Part 2 case. Save that the powers of the High Court in such a case include, by s106(1)(b), a power to "direct the judge to decide the relevant question again", the provisions are materially the same as those in s28 and s29.

27. Post-extradition, s54 of the Act provides for the appropriate judge to receive a request for a person extradited to a category 1 territory to be dealt with in that territory for another offence. By s54(5), such a request must be considered by the judge at a "consent hearing". So far as is material, s55 provides –

> "**55 Questions for decision at consent hearing**
>
> (1) At the consent hearing under section 54 the judge must decide whether consent is required to the person being dealt with in the territory for the offence for which consent is requested.
>
> (2) If the judge decides the question in subsection (1) in the negative he must inform the authority making the request of his decision.
>
> (3) If the judge decides that question in the affirmative he must decide whether the offence for which consent is requested is an extradition offence.
>
> (4) If the judge decides the question in subsection (3) in the negative he must refuse consent.
>
> (5) If the judge decides that question in the affirmative he must decide whether he would order the person's extradition under sections 11 to 25 if –
>
> (a) the person were in the United Kingdom, and
>
> (b) the judge were required to proceed under section 11 in respect of the offence for which consent is requested.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must give consent.
>
> (7) If the judge decides that question in the negative he must refuse consent."

Relevant case law: speciality:

28. The principles established by the case law were conveniently summarised by Coulson LJ (with whom Holgate J agreed) in *R (Mihaylov) v Bulgaria* at [18]:

> "There are a number of well-established principles:

> a) There is a strong presumption that EU Members States will respect specialty rights in accordance with their international obligations: see the judgment of Dyson LJ (as he then was) at [67]-[68] in *Ruiz and others v Central Court of Criminal Proceedings No5 of the National Court of Madrid [2008] 1 W.L.R. 2798* and *Brodziak* (citation below) at [46].
>
> b) Accordingly, this court will presume that the State in question will act in compliance with those obligations unless there is compelling evidence to the contrary: see *Arronategui v 1st, 2nd, 3rd and 4th Sections of the National High Court of Madrid, Spain and others [2012] EWHC 1170 (Admin) at [47]*.
>
> c) The court must be satisfied that there are practical and effective arrangements in the requesting territory to ensure that specialty will not be infringed: see *Farid Hilali v Central Court of Criminal Proceedings No.5 Madrid [2006] EWHC 1239 (Admin) at [46]*.
>
> d) This primarily goes to the substantive law operating in the requesting territory. As Scott Baker LJ pointed out at [49] of *Hilali*, the basic question was whether the rule of specialty was catered for in the law of the requesting territory. The same emphasis was provided by Dyson LJ in *Ruiz* at [67]-[68]. He said that what was important was that Spain (the State in question in that case) had incorporated the specialty rule into their law; that there was no compelling evidence that the Spanish authorities would act in breach of the rule; and that the requested person had a remedy in domestic law.
>
> e) The burden is therefore on the requested person to show that the presumption has been rebutted in the particular case and that appropriate speciality arrangements were not in place: *Brodziak and others v Circuit Court in Warsaw, Poland [2013] EWHC 3394 at [42]*."

29. In *Brodziak v Poland* the court was concerned that the response of the requesting judicial authority to a request for clarification (in relation to disaggregation of sentences) had been "highly unsatisfactory". It nonetheless concluded, at [55], that the evidence was not sufficiently compelling to displace the strong presumption that the Polish authorities would act in accordance with their international obligations in respect of speciality, and that the appellant had therefore failed to prove the absence of effective speciality arrangements. The court gave two principal reasons for the conclusion: the evidence before it that the relevant provisions of the Polish Criminal Procedure Code were consistent with the protection of speciality; and the absence of any evidence of even a single case in which an extradited person had been required in practice to serve a sentence relating in whole or in part to an offence for which he was not extradited to Poland.

30. In both *Enasoaie v Romania*, at [26] and [41], and *Nonea v Romania* at [6], the court referred to Article 117 of the Romanian Criminal Code, which implements the

principles stated in Article 27 of the Framework Decision. Subject to certain qualifications which are not material to the present case, Article 117 provides –

> "(2) … a person surrendered to the Romanian authorities may not be prosecuted, sentenced or otherwise deprived of his/her liberty for a different act committed prior to his or her surrender other than that for which he/she was surrendered unless the executing member State gives its consent."

In *Enasoaie v Romania* at [68] the court confirmed that Romania therefore does have in place "effective arrangements to comply with its international obligations as to speciality". Similarly, in *Nonea v Romania* at [16] the court accepted that Article 117 enshrined the principle of speciality in Romanian law.

31. In *Leymann and Pustovarov* (Case C-388/08, PPU) the Court of Justice of the European Union considered the exceptions to the speciality rule provided for by Article 27 of the Framework Decision, and in particular Article 27(3)(c) in respect of cases in which the criminal proceedings do not give rise to the application of a measure restricting personal liberty. The court, at [73], said this about the effect of that exception:

> "It follows that, in the case of that exception, a person can be prosecuted and sentenced for an 'offence other' than that for which he was surrendered, which gives rise to a penalty or measure involving the deprivation of liberty, without recourse being necessary to the consent procedure, provided that no measure restricting liberty is applied during the criminal proceedings. If however, after judgment has been given, that person is sentenced to a penalty or a measure restricting liberty, consent is required in order to enable that penalty to be executed."

Relevant case law: cross-appeal:

32. When considering the application for leave to appeal in *The Government of the United States of America v Assange* [2021] EWHC 2528 (Admin) the court, at [31], accepted written submissions that the appeal hearing must be limited to the USA's appeal under s105:

> "Neither the 2003 Act, nor the Rules, make any provision for a cross-appeal to be heard in respect of the points which the DJ decided against the respondent, but which did not result in his case being sent to the Secretary of State and which therefore cannot be the subject of an appeal at this stage. The effect of the statutory provisions is that an element of duplication of proceedings seems to be unavoidable if the present appeal succeeds."

33. At the appeal hearing in that case, [2022] 4 WLR 11, the court referred at [23] to the acceptance of that submission and said –

> "We have heard argument on the USA appeal alone. We note that in *Government of Turkey v Tanis* [2021] EWHC 1675 (Admin) Jeremy Johnson J indicated in an *obiter dictum* his provisional view that a respondent to an appeal could reargue all the grounds on which he lost to show that the overall outcome would have been the same, even if the appeal grounds succeed. We have heard no argument on this point. It may call for full argument in a suitable case."

34. In *Government of Turkey v Tanis* at [88] – [93] the court said –

> "88. … where, as here, a district judge orders that the requested person be discharged (on the basis of at least one, but not all of the grounds argued by the requested person), that person has no right of appeal under Part 2 of the 2003 Act against the rejection of his argument that discharge should have been ordered on a wider basis. The only right of appeal is that contained in section 105, which permits an appeal to be brought by the requesting state but not by the requested person.
>
> 89. Nothing within Part 2 of the 2003 Act, or the Criminal Procedural Rules, explicitly permits a person in the position of the respondent to bring a cross-appeal.
>
> 90. However, the appellant's appeal may only be allowed if the court is satisfied that the District Judge "would not have been required to order the person's discharge" (section 106(4)(b) and section 106(5)(c)). It is open to the respondent to argue that this condition is not satisfied because the District Judge would have been required to order the respondent's discharge by reference to the points that the respondent seeks to raise on the cross-appeal.
>
> 91. Further, section 106 provides that where the conditions in subsection 4 or subsection 5 are satisfied the Court "may" allow the appeal – see section 106(1) and (3). It is open to the respondent to argue that this language permits the court to exercise a residual discretion not to allow an appeal if it can be shown that the District Judge would have been required to order the respondent's discharge on other grounds.
>
> 92. Accordingly, whilst there is nothing in the legislation that explicitly permits a cross-appeal, it may nevertheless be open to a respondent to argue that a district judge's decision should be upheld for reasons different from or additional to those given by the district judge.
>
> 93. It is not, in the circumstances of this case, necessary to reach a final conclusion on this issue if, as I have concluded, the appellant's appeal would otherwise fall to be dismissed."

35. In *Dempsey v Government of the United States of America* [2020] 1 WLR 3103 ("*Dempsey v USA*") the circumstances were that there had been an earlier appeal by the USA against a decision of a DJ discharging the requested person on the ground that the specified offence was not an extradition offence. The High Court had allowed that appeal and remitted the case to the DJ under s106(6). On remittal, the requested person had for the first time sought to argue that his extradition would be incompatible with his rights under art.3. The DJ ruled that he had no jurisdiction to determine that issue, and the requested person appealed.

36. The High Court dismissed the appeal, holding that the DJ had been correct to decline to hear evidence or argument on a bar to extradition which had not been raised at the extradition hearing. The court referred to the requirement for the DJ, on remittal, to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing. It noted at [21] that other statutory provisions make plain that, where the High Court has returned a question for re-decision and the judge below has reached the same decision as before, no new issues may be raised. The court at [22] stated:

> "It would be odd indeed if Parliament had limited the judge if the question is decided in the same way, but gave free rein … to entertain arguments on bars to extradition not raised at the extradition hearing if he or she decides it differently. The expectation is that all matters in issue would be resolved at the extradition hearing with all disputed matters resolved at a subsequent appeal and then the matter returned to the judge for final disposal."

37. The court continued, at [24] –

> "In our judgment, the key to understanding what the judge is required to do is in what is meant by "the extradition hearing" in that phrase. It is not a reference to a hypothetical extradition hearing, but the extradition hearing that occurred and gave rise to the appeal. The judge must proceed as he or she would have done at the earlier extradition hearing if the question had been determined differently. In September 2017 had the judge decided the extradition offence issue differently under section 78, he would not have considered any further bars to extradition beyond those raised by the appellant, but taken the step required of him at the end of the process. He would have sent the case to the Secretary of State."

38. Later, the court made observations about the undesirability of a piecemeal approach to issues, saying at [28] –

> "At the extradition hearing the judge considered the extradition offence issue and decided it in favour of the appellant. As a result, he was required by section 78(6) to order the appellant's discharge. Although it might theoretically have been possible to stop there, the language of the 2003 Act does not require the judge to go no further. The judge "must proceed" to the next

> statutory provision in the event that he decides any issue against the requested person but that language does not mean the judge must not proceed to determine other, indeed all, issues that do or may arise in the case before him. There is no impediment to deciding all issues. On the contrary, it would be inconsistent with proper case management, to common sense and to usual practice not to do so. A piecemeal approach could result in multiple appeals and hearings which is incompatible with the scheme of the 2003 Act."

Analysis: speciality:

39. It is in my view clear that the principle of speciality is engaged in the circumstances of this case. I do not accept the appellant's suggestion that the respondent's participation in the proceedings relating to the Vaslui offence amounts to a waiver of his speciality rights in relation to that offence. Nor do I accept the submission that it is not properly open to the respondent both to participate in those proceedings and to rely on them as a reason why he should not be extradited. In my view, he is not to be criticised for responding to proceedings which the Romanian authorities have chosen to bring against him.

40. The focus of s17(1) of the Act is on whether there are speciality arrangements with the requesting state. As I read the DJ's judgment, he accepted that on the face of it, Romania does have speciality arrangements; but he concluded that there was compelling evidence that it would not comply with them in this case, the presumption of compliance having been rebutted by reason of the ongoing prosecution of the appellant for the Vaslui offence.

41. The burden is on a requested person to prove that speciality is not catered for by practical and effective arrangements. I respectfully agree with the observations of Coulson LJ in *R (Mihaylov) v Bulgaria*, at [23], to the effect that the burden will not necessarily be discharged by pointing to some instances where the requesting state may have breached the speciality rule. But in any event, there is no evidence in the present case that Romania has breached the rule in relation to any other requested person. That is, in my view, an important factor.

42. It is unfortunate that neither party put Article 117 of the Romanian Criminal Code before the DJ. There is force in the submission on behalf of the respondent that it is too late for the appellant to do so now. As a result, the DJ proceeded on the basis that the appellant's case was "to an extent" weakened by the absence of any indication that the speciality rule had been incorporated into Romanian domestic law. He would not have done so if he had been made aware of Article 117. He fell into error through no fault of his own.

43. It was not, however, an error of central importance to his decision. The DJ recognised that Romania is a signatory to the European Convention on Extradition and is bound by the Framework Decision. Moreover, the DJ made clear that the absence of any indication of relevant domestic law did not begin to establish a likelihood of non-compliance; and the burden remained on the respondent to prove that there were no practical and effective speciality arrangements.

44. With all respect to the DJ, he did in my view fall into error in two respects which were of central importance to his decision. First, he either disregarded the possibility of a request for consent pursuant to s54 of the Act, or made an unwarranted assumption that no such request would be made. Secondly, he wrongly regarded the fact that the Vaslui proceedings were ongoing as providing compelling evidence of a likely breach of speciality and therefore displacing the presumption of compliance.

45. It is understandable that the DJ was puzzled by Romania's decision not to issue an EAW in relation to the Vaslui offence. In the circumstances of this case, however, he was not entitled, in my view, to treat that unexplained decision as evidence that Romania would deliberately breach the speciality rule, and therefore compelling evidence rebutting the presumption that Romania would comply with its international obligations. Romania had not acted unlawfully in choosing not to issue an EAW. The possibility of doing so at a later stage, and the possibility of a request for consent pursuant to s54 of the Act, remained open, and the respondent could show no basis for assuming that neither of those courses would be taken. Nor could he show any basis for assuming that the respondent would be denied any domestic remedy if he was dealt with in a way which breached the principle of speciality. There was and is no suggestion that Romania has breached the speciality rule on other occasions. The Romanian authorities had been entirely open about the prosecution of the Vaslui offence and had formally requested judicial assistance in order to do so.

46. I am not persuaded by the submission on behalf of the respondent that Romania had specifically been asked to confirm that it intended to proceed either by seeking an EAW or by seeking post-surrender consent under s54 of the Act, but had not so confirmed. The question to which that submission refers had been part of a request for further information which began by asking whether the respondent had been convicted of the Vaslui offence at a hearing on 23 April 2021; and the relevant question began "In the event that Marian Gurau has been convicted can you confirm …". As at the date of the reply, the respondent had not been convicted because the hearing on 23 April 2021 had been adjourned to a later date. It is therefore understandable that Romania did not answer a question which had not yet arisen.

47. In those circumstances, the mere fact that Romania had taken an unexpected course could not be regarded as compelling evidence which rebutted the strong presumption of compliance.

48. I would add that the conviction of the respondent for the Vaslui offence, after the hearing below but before the hearing in this court, does not alter my view. That conviction and sentence had not been made final, and had not resulted in the respondent losing his liberty.

49. It follows that in my judgment the appellant succeeds on the first issue. For the purposes of s29(3) of the Act, the relevant question is whether the respondent had discharged the burden of proving that there were no speciality arrangements with Romania. The DJ ought to have decided that question differently. If he had done, given that the speciality issue was the only ground of challenge on which the respondent succeeded, the DJ would not have been required to order the respondent's discharge.

50. It therefore becomes necessary to consider the second issue.

Discussion: cross-appeal:

51. The advantages of all issues arising from an appeal being determined at the same time, and the undesirability of determining the issues in a piecemeal fashion, are obvious. It would undoubtedly be convenient to be able to interpret the statutory provisions in such a way as to permit a cross-appeal. I am, however, unable to do so.

52. As counsel have pointed out, the Act does not contain any specific provision which entitles the respondent to cross-appeal within this appeal, and consequently there are no relevant procedural rules and requirements in the Criminal Procedure Rules. In a Part 1 case in which the judge at the extradition hearing has ordered the discharge of the requested person, the only avenue of appeal is that given by s28(1) to the judicial authority; and that is limited to an appeal against the relevant decision which, by s28(3) of the Act, is the decision in favour of the requested person which resulted in his discharge. It is in my view impossible to read into that section any entitlement on the part of the requested person to appeal, or to apply for leave to appeal, against any decisions at the extradition hearing which were adverse to him. Nor, in my view, is it permissible to adopt the approach, suggested as a possibility in *Government of Turkey v Tanis* (in the context of materially-identical provisions in Part 2 of the Act), of reading a right of appeal into the condition stated in s29(3)(b). That condition is only met if the result of deciding the relevant question differently is that the judge would not have been required to order the requested person's discharge. The focus, in my view, is on the effect of altering the decision on the relevant question alone: not on the effect of altering the decisions on both the relevant question and one or more other questions which were before the judge at the extradition hearing but form no part of the appeal.

53. The issue in *Dempsey v USA* was whether a respondent, on remittal to the judge following an appeal determined against him, could raise for the first time an issue which had not been considered at the extradition hearing. I respectfully agree with the court's decision on that issue; but I do not think it undermines the conclusion I have reached as to whether a respondent can cross-appeal on issues which were before the court at the extradition hearing.

54. In short, this court in my judgement has no jurisdiction to hear a cross-appeal by the respondent. It is for Parliament to decide whether amendment of the statute, to permit such an appeal, is desirable. It follows that it is in my view neither necessary nor appropriate for this court to consider the submissions as to the respondent's proposed grounds of cross-appeal, which the parties helpfully provided in case the court reached a different conclusion as to jurisdiction.

55. The conclusion which I have reached does not have the effect that, in circumstances such as these, a respondent who wishes to appeal against the adverse rulings at the extradition hearing is deprived of any opportunity to do so. The matters which were before the court at the extradition hearing will again come before the judge on remittal pursuant to s29(5) of the Act. The judge will at that stage be required to proceed as he would have done if he had decided the relevant question differently at the extradition hearing. Subject to the matters discussed at [59] and [60] below, the judge will no doubt simply reaffirm his earlier decision(s), and the respondent will have a right of appeal under s26 of the Act against the adverse ruling(s). That involves, as was recognised in *USA v Assange*, some duplication of effort: it is unfortunate that that is so, but it is in my judgement the effect of the statutory provisions.

56. The court in *Dempsey v USA* held that the statutory provisions did not permit, at the hearing following remittal, argument on an entirely new issue; but it identified at [25-27], [32] the possibility in an appropriate case of an application under rule 50.27 of the Criminal Procedure Rules to reopen the determination of the appeal. Rule 50.27 caters for cases in which -

> "(i) it is necessary to reopen [a previous] decision in order to avoid real injustice,
>
> (ii) the circumstances are exceptional and make it appropriate to reopen the decision, and
>
> (iii) there is no alternative effective remedy."

The court in *Dempsey v USA* noted that such an application had been found to be appropriate in *Chawla v Government of India* [2020] 1 WLR 1609 at [38-40], [43]. In that case, the defendant was seeking to relitigate the relevant question which had already been decided in the requesting state's appeal.

57. I respectfully agree with the decision in *Chawla v Government of India*: in the rare case where a defendant has grounds to reopen the relevant question which has been decided against him on an appeal by a requesting state against his discharge, his remedy lies in an application pursuant to rule 50.27.

58. Mr Summers KC raised concerns as to the consequences of the decision in *Dempsey v USA* in cases in which a requested person wishes to raise, at the hearing following remittal, either fresh evidence on issues decided against him at the original hearing, or a completely fresh bar to his extradition.

59. As to the first of those situations, *Dempsey v USA* does not in my view prohibit a DJ, at the hearing following remittal, from receiving fresh evidence relevant to an issue argued at the extradition hearing if it is appropriate to do so in accordance with usual principles. As I have noted, the court in *Dempsey v USA* was considering an attempt to raise, at the hearing following remittal, an issue which had not been raised at all in the extradition hearing. In the passage which I have quoted at [36] above, the court distinguished between bars to extradition which had not been raised at the extradition hearing, and the matters in issue which it expected would be resolved at the appeal. It is in my view permissible in principle for a requested person, at the hearing following remittal, to apply to the DJ to adduce fresh evidence on an issue which had previously been argued but in relation to which it could be said that fresh evidence, which might be decisive on that issue, had become available since the extradition hearing. Cases in which such an application will succeed may well be few in practice.

60. In the second situation, the defendant (as I have said at [55] above) will have following the remittal hearing a right of appeal pursuant to s26 of the Act. As part of that appeal, he will be able to raise an entirely new issue where it is appropriate to do so in accordance with well-established principles. By s27(2) of the Act, the court hearing that appeal will have the power to allow his appeal if he can satisfy the criteria in s27(4), namely that –

> "(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;
>
> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge."

Such cases may well be infrequent, but when they arise the requested person will not be without remedy.

Conclusion:

61. For those reasons, I would allow this appeal; quash the order discharging the respondent; remit the case to the DJ; and direct the DJ to proceed as he would have been required to do if he had decided the relevant question differently at the extradition hearing.

Mr Justice Jay:

62. I agree.