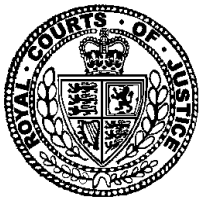

Neutral Citation Number: [2025] EWHC 600 (Admin)

Case No: AC-2023-LON-003197

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2025

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE DBE CB

- -

Between :

MARINESCU

Appellant

- and –

FOURTH DISTRICT COURT IN BUCHAREST
ROMANIA

Respondent

- -
- -

Miss Mary Westcott (instructed by Lansbury Worthington) for the **Appellant**
Ms Hannah Burton (instructed by CPS Extradition Unit) for the **Respondent**

Hearing date: 11th February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 14 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE COLLINS RICE DBE CB

Mrs Justice Collins Rice:

Introduction

1. Mr Marinescu appeals, with the permission of the Court, a District Judge's decision to order his extradition to Romania to serve a prison sentence passed on him there. He says the District Judge's decision was wrong. He also wishes to be able to rely on evidence of developments postdating it.

Background

2. Mr Marinescu's extradition is sought under a conviction warrant issued by the Romanian judicial authority. He is wanted to serve a sentence of 4 years' imprisonment, all of which remains outstanding. The sentence was imposed in relation to a single count of fraud, committed with co-defendants, through a company. That comprised the selling of non-existent holiday packages, over a period between March and May 2009. There were 86 individual victims. The total value was just short of a hundred thousand euros. Efforts were made subsequently to destroy the evidence.

(a) The Romanian criminal proceedings

3. The prosecution case came before a Romanian criminal court on 15th June 2015. Mr Marinescu and his co-defendants attended. He was legally represented. The records indicate he was informed of his rights, including his right to plead guilty and request the trial to be conducted on the basis of the prosecution evidence – and so benefit from a one-third reduction in the applicable sentence. He is recorded as affirming a wish to proceed on that basis. The court adjourned.

4. Judgment was handed down at a hearing on 9th July 2015. Mr Marinescu did not attend. He was represented by a court-appointed lawyer. The court imposed a sentence of 4 years' imprisonment, suspended with conditions for 5 years. Conditions included a requirement to give notice of change of address and of any period of travel longer than 8 days.

5. Mr Marinescu left for the UK shortly afterwards. He did not tell the authorities. He has remained here ever since.

6. In his absence, the Romanian prosecutors appealed the leniency of his sentence. The appeal court heard the case on 2nd December 2015. Judgment was handed down on 16th December 2015. The appeal court considered the sentence passed to have been wrongly mitigated under the applicable criminal code. It concluded by retaining the four year period but removing the suspension, substituting a sentence of 4 years' immediate imprisonment.

(b) Extradition history

7. An extradition warrant was issued on 29th January 2016. It was not certified until 15th July 2021. Mr Marinescu was arrested at his home in Leicester on 5th August 2021 and bailed shortly afterwards. In the extradition proceedings which followed, Mr Marinescu resisted extradition on grounds including inadequate particularisation of the

warrant, oppressiveness with particular reference to delay, decision in absentia, Romanian prison conditions and disproportionate interference with his and his family's rights, protected by Article 8 ECHR, to private and family life (he had married in the UK and a child had been born in 2018).

8. The extradition proceedings resulted in a decision by District Judge Heptonstall on 18th July 2022 that the warrant was deficient on grounds of particularity. He discharged Mr Marinescu from the warrant. However, the District Judge held Mr Marinescu to be a fugitive from justice, and rejected all the other grounds on which he had resisted extradition.

9. The Romanian authorities sought permission to appeal that decision (Mr Marinescu intended to cross-appeal). Permission to appeal was refused on the papers on 7th October 2022 and not renewed.

10. The warrant was then reissued on the same substantive basis, but with additional detail, on 9th December 2022 and certified on 29th December 2022.

The present appeal

(a) The decision challenged

11. Extradition on the reissued warrant was ordered by District Judge Heptonstall, after a hearing on 6th September 2023. His reasons are set out in a written judgment dated 25th October 2023. Mr Marinescu had resisted extradition on grounds that (a) the reissued warrant still lacked particularity; (b) extradition would be unjust and oppressive; (c) decision in absentia; (d) unfair proceedings in Romania; (e) Romanian prison conditions; (f) Article 8 rights; and (g) abuse of process. The District Judge considered and rejected all of these grounds.

(b) Basis of appeal

12. Permission to appeal was sought in relation to: (a) oppression, with particular reference to delay; (b) decision in absentia; (c) unfair proceedings in Romania; (d) Article 8 and (e) abuse of process.

13. Sir Duncan Ouseley granted permission on three grounds only: decision in absentia, Article 8 and abuse of process. Mr Marinescu submits that the District Judge's decision was wrong in all three respects.

14. In relation to the issue of decision in absentia, he asks me in particular to consider the District Judge's decision in the light of the subsequent decisions of the UK Supreme Court in *Bertino v Italy [2024] 1 WLR 1483* and *Merticariu v Romania [2024] 1 WLR 1506*. These recent developments in the law were mentioned by Sir Duncan Ouseley in giving permission to appeal.

15. Mr Marinescu also relies on, and applies to admit, further evidence postdating the District Judge's decision.

(c) Grounds of appeal

16. Mr Marinescu's grounds of appeal are as follows:

a) *Decision in absentia (Extradition Act 2003, section 20).* The District Judge was wrong in finding Mr Marinescu deliberately absented himself from the Romanian appeal hearing in December 2015. The District Judge was not entitled to find that, by his own actions, he had unequivocally, knowingly and intelligently waived his right to attend the relevant hearings. He was not entitled to make his alternative finding about a right to retrial.

b) *Private and family life (Extradition Act 2003, section 21 and Article 8 ECHR).* The District Judge was wrong over all in finding extradition compatible with Art.8, with particular reference to Mr Marinescu's role as the primary carer of his son, and to the situation of his wife and his increasingly frail parents – all responsibilities accruing long after the 2009 extradition offence and 2015 sentencing.

c) *Abuse of process by relitigation*. The District Judge's conclusion on the relevant 'broad merits-based approach' was wrong, because after the previous discharge for the same extradition offence, the case should have been stayed as an abuse of process.

Legal framework

17. The statutory framework within which this appeal is brought is well-established and uncontroversial. It is governed by the Extradition Act 2003 ('the Act').

(a) Extradition appeals

18. The Act empowers the High Court to allow an extradition appeal if it finds (a) the District Judge ought to have decided a question before him at the extradition hearing differently, and (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

19. The Divisional Court in *Love v USA [2018] EWHC 172 (Admin); [2018] 1 WLR 2889* emphasised (at [25]) that the appeal must focus on error. '*Extradition appeals are not rehearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence.*' Instead, the appellate court must focus on whether the decision of a District Judge was wrong.

20. What 'wrong' means in this sense has been consistently applied in the case law. It does not mean a decision which might be disagreed with, but a decision the Judge was not properly entitled to take at all. It means for example that the District Judge either (a) misapplied well-established legal principles, (b) made a relevant finding of fact that no reasonable judge could have reached on the evidence, (c) failed to take into account a relevant fact or factor, or took into account an irrelevant fact or factor, or (d) reached a conclusion overall that was irrational or perverse.

21. Deciding whether a District Judge's decision was 'wrong' on this basis is largely an historical exercise, the appellate court acting as a court of review. But in some circumstances it is possible for an appellate court to take into account material not before the District Judge. The Divisional Court in *Fenyvesi v Hungary [2009] EWHC*

231 (Admin) set out a two-part test for the admission of fresh evidence into an extradition appeal (at [32]). First, admissibility is restricted to evidence which either did not exist at the time of the extradition hearing or was not at the disposal of the party wishing to adduce it and which they could not with reasonable diligence have obtained. And second, the appellate court must be satisfied that if the evidence had been adduced, the result would have been different and resulted in the appellant's discharge. It is described as a 'strict test', consonant with the parliamentary intention underlying the 2003 Extradition Act, that extradition cases should be dealt with speedily and not generally held up by attempts to introduce equivocal subsequent evidence.

(b) Section 20 – Decision in absentia

22. Section 20 of the Act provides that, in relation to a conviction warrant case, if a judge finds that a requested person was not '*convicted in his presence*', the judge must go on to decide whether the person '*deliberately absented himself from his trial*'. The parties ask me to proceed on the basis that, in the present case, the relevant proceedings for these purposes are those which form the basis of the warrant under which Mr Marinescu is now sought to serve an immediate sentence of four years' imprisonment – namely the Romanian appeal proceedings in December 2015 which substituted that sentence for the suspended sentence imposed at first instance the previous July, and which Mr Marinescu did not attend. The CPS also accepts in the present case that, following the decision in *Merticariu*, it cannot rely on Mr Marinescu's having a right to retrial on surrender, for the purposes of section 20(5) of the Act.

23. The parties therefore agree that the single question arising under this ground of appeal is whether, on the facts as found by the District Judge and applying the criminal standard of proof, Mr Marinescu can properly be considered to have *deliberately absented himself* from the appeal proceedings. Unless he can, then, further to section 20, the appeal must be allowed and Mr Marinescu discharged from extradition.

24. The parties also agree that that question must now be approached applying the guidance of the Supreme Court in *Bertino*. In that case, the Supreme Court tied its analysis of section 20's test of deliberate absenting to the jurisprudence of Article 6 ECHR – the right to a fair trial. It noted (at [33]) that neither the letter nor the spirit of Article 6 prevents a person from waiving of his own free will, either expressly or implicitly, the entitlement to the guarantees of a fair trial. But to be effective for those purposes, waiver of the right to take part in the trial must be unequivocal. As a minimum that requires that he could reasonably have foreseen what the consequences of his conduct would be.

25. From its survey of the jurisprudence, the Supreme Court noted (at [54]) that for deliberate absenting to be regarded as equivalent to an individual defendant's waiver of the right to attend criminal proceedings, it had to be '*unequivocal and effective, knowing and intelligent*'. A general manifest lack of diligence which results in ignorance of criminal proceedings will not by itself be enough: '*there can be no question of waiver by the mere fact that an individual could have avoided, by acting diligently, the situation that led to the impairment of his rights*.' (*Ibid* at [55]). Fugitivity alone is not a sufficient basis for a finding that an individual deliberately absented himself from his trial.

26. For unequivocal waiver to be established, '*ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another.*' (*Ibid* at [54]). And '*ordinarily it would be expected that the requesting authority must prove that the requested person had actual knowledge that he could be convicted and sentenced in absentia*' (*Ibid* at [58]). But, the Court continued in the same paragraph,

> behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence. … the facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. Examples given were where the accused states publicly or in writing an intention not to respond to summonses of which he has become aware; or succeeds in evading an attempted arrest; or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces. This points towards circumstances which demonstrate that when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option. ...

27. In *Bertino* itself, the appellant was under investigation. He had not been arrested, questioned or charged in connection with his alleged offending when he absented himself, and '*a prosecution was no more than a possibility*'. He was never officially informed that he was being prosecuted nor was he notified of the time and place of his trial. There were no criminal proceedings of which he could have been aware, still less was there a trial from which he was in a position deliberately to absent himself. On those facts, the Court concluded he could not have been found to have deliberately absented himself from his trial.

(b) Section 21 and Article 8 – Private and family life

28. A judge at first instance approaching a question of Art.8 incompatibility in an extradition case must proceed by identifying relevant factors in favour of extradition, and relevant factors against, and then performing an evaluative overall balancing exercise to reach a proportionality assessment (*Celinski v Poland [2015] EWHC 1274 (Admin), [2016] 1 WLR 551*).

29. Where the interests of children of a family are engaged in the balancing exercise, there is guidance to be found not only in *Celinski* itself but also in the earlier Supreme Court decisions in *Norris v USA [2010] UKSC 9* and *HH v Italy [2012] UKSC 25*, and in the succinct summary set out by Dingemans J (as he then was) at [16] in *Palioniene v Lithuania [2019] EWHC 2096 (Admin)*. The interests of children of a family are '*a*

primary consideration' – albeit not '*the primary consideration*' nor '*the paramount consideration*'. In a conviction case where the requested person has founded family life in the UK on fugitivity and there are no materially weighty reasons to do otherwise, the *degree* of impact on family life which must be shown in order to inhibit extradition must be something appreciably more than that inevitably involved in family separation. The court observed as follows in ***HH*** (at [132]):

> 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).

30. On an appeal against an Art.8 compatibility determination, the starting point remains that the single question for the appellate court is whether or not the District Judge made the wrong decision (***Celinski*** [24]). The Supreme Court put it this way in ***Re B*** *[2013] UKSC 33* at [93]-[94]:

> An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii). …So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal.

(d) Abuse of process

31. The particular species of abuse of process in issue in the present appeal focuses on the issue of relitigation – here, related to the fact that extradition was ordered, in the decision challenged, on the basis of a *reissued* arrest warrant. Technically, there is no doctrine of res judicata or issue estoppel in extradition proceedings, and the caselaw prescribes a '*broad, merits-based judgment which takes account of the public and private interest involved and also takes account of all the facts of the case*' (*Giese v USA [2018] EWHC 1480 (Admin)*; *Jasvins v Latvia [2020] EWHC 602 (Admin)*; *Iancu v Romania [2023] EWHC 1274 (Admin)*).

32. This is an intensely fact-specific exercise. The '*broad merits-based judgment*' needs to set out the relevant facts and factors both ways before going on to an overall evaluation of whether the proceedings in question amount to an impermissible collateral attack on the antecedent proceedings or impermissible relitigation of any other sort. The relevant factors will include the gravity of the offending, the nature and cause of the events leading to the outcome of the antecedent litigation, the character of the subsequent litigation and its relationship to the antecedent litigation, the effect of all that on the extent of the public interest in extradition, and the effect on the requested person including through change of circumstance or the passage of time.

33. Whether a reissued arrest warrant is an impermissible collateral attack on previous proceedings or otherwise an abuse of process by relitigation may also involve an evaluation of whether, viewed in the round, it amounts to an improper and unfair litigation advantage to the requesting state. That may be so, for example, where it seeks to avoid, undo or set aside previous decisions in a manner only properly available through an appeal route (*Rymarski v Poland [2023] EWHC 3389 (Admin)*).

Consideration

(a) Ground 1 – deliberate absenting (section 20)

(i) The relevant facts

34. The authorities have consistently stressed the highly fact-sensitive nature of the test for deliberate absenting, *Bertino* included. I begin therefore with the relevant facts as found by the District Judge, to which I must give due respect unless I can take the view that his findings were not properly open to him. That applies in particular to his assessment of oral evidence.

35. It is not in doubt that Mr Marinescu attended the Romanian criminal proceedings on 15th June 2015. There was formal documentary evidence before the District Judge about that hearing in the form of a translated official 'minute of proceedings'. That states that Mr Marinescu confirmed his presence and identity through his lawyer in answer to a roll call in open court, along with his two co-defendants. It records the court reciting the charge brought against him and drawing his attention to his rights and obligations during the criminal proceedings. That included his entitlement to plead guilty at the outset, request that the case be considered on the basis of the prosecution evidence, and obtain a one-third reduction of the sentence limits. It records that Mr

Marinescu affirmed his desire to do so. It records that that would be confirmed in writing so that it could be signed and added to the court file. It records the prosecutor requesting that the defendants who had pleaded guilty should be formally convicted according to the provision of the criminal law most favourable to them (it appears there had been some relevant change in the law). It records all three defendants' lawyers making representations about the most favourable provision, and about sentence.

36. It records Mr Marinescu's lawyer making representations as to sentence as follows:

> As regards the merits of the case, considering the defendant's position in the trial, he requests the court to apply Article 396, paragraph 10 of the Criminal Code and to reduce the sentence by one third. With regard to the individualisation and the manner of serving the sentence, the court is requested to order the conditional suspension of the sentence, with the application of a sentence oriented towards the special minimum, as reduced. He also considers that the defendant's participation in the offence is limited. He asks the court to uphold in the defendant's favour the fact that he pleaded guilty and co-operated genuinely and effectively with the prosecuting authorities. The personal circumstances of the defendant, the fact that he has no criminal record, is a young person who can reintegrate into society and wishes to have a job, should also be considered in his favour. For all these reasons, he requests the court to apply a minimum sentence and to conditionally suspend its execution.

37. It records civil law matters as also having been addressed. The hearing ended with each defendant being given an opportunity to address the court in person. Mr Marinescu '*in person, takes the floor last and affirms he has nothing else to add*'. The record concludes by stating that the court, needing more time to deliberate on the matter, adjourned its decision.

38. There was also before the District Judge a formal note of the resumed first instance proceedings on 9th July 2015, which Mr Marinescu did not attend. That recites the prosecution case and records as follows:

> At the hearing of 15.06.2015 the defendant Marinescu … stated that he fully admits the offence of which he was accused in the indictment and wishes to be tried in a speedy trial, his statement being written down and attached to the case file after being read and signed. He also indicated that he agreed to community service and to cover the damage caused.

It further records that, all three defendants having pleaded guilty as charged in the indictment, and that having been corroborated, '*it is clear beyond reasonable doubt that the defendants committed the offences for which they are tried*'. They were formally convicted on the basis requested by their lawyers on the previous occasion. Sentencing ensued, by reference to the criminal code, the prosecution facts, and the mitigations put forward. The four year custodial sentence imposed on Mr Marinescu was suspended for five years, subject to conditions. These 'supervision measures' included reporting to the probation service, providing employment documentation, and giving notice of

'*changing domicile, residence or place of dwelling, and of any travel longer than 8 days, as well as of their return date*'.

39. Also before the District Judge were the Romanian judicial authority's answers, dated 7th September 2021, to a request for further information (RFI) about the Romanian criminal process in Mr Marinescu's case. This confirmed that at the hearing he had attended, he was informed of his procedural rights in a statement which he signed. These rights included:

> …that he benefited from the presumption of innocence until a final decision was delivered, that he had the right to be informed about the offence for which he was being investigated, he had the right to consult the case file, an ex officio defence counsel was appointed, he had the obligation to appear if requested by the judicial bodies, as well as that he had the obligation to announce in writing within 3 days, any change of address, and his attention was drawn that any failure to comply with that obligation, the summonses and any other documents sent at the first address would remain valid and it would be considered that he was made aware of them…

40. The response to the RFI set out that Mr Marinescu was notified in advance of the appeal hearing by notices sent to the address he had provided, but these were returned marked '*the addressee does not live at this address any more*'.

41. Before the District Judge, Mr Marinescu had given a very different account of the hearing he had attended on 15th June 2015. He said the hearing had lasted a few minutes only, and had been chaotic. He ('*vehemently*') denied having pleaded guilty. The District Judge considered Mr Marinescu's account '*so improbable as to be incredible*'. He rejected his assertion that he did not admit the offence.

42. The District Judge concluded as follows:

> [61] In those circumstances I do find that Mr Marinescu was present at this hearing in June 2015 during which he admitted the offence and there were significant submissions before the court reserved its judgment. I entirely reject the denial that he knew that there was to be a further stage and that such stage would include the decision as to his guilt, with any consequent sentence. I am sure he knew that he was liable to be convicted and sentenced.
>
> [62] Further, I reject his account that he did not understand the obligations which were imposed on him in the proceedings and set out in documents that he repeatedly signed.

43. Pausing there, I consider these findings of the District Judge to be unimpeachable. He was entitled to prefer the contemporaneous documentation, and the evidence in response to the RFI, to Mr Marinescu's oral account of '*a scene of chaos with 100 people yelling at the judge in open court*'. And he was entitled to reject his suggestion that the official documents had been fabricated. I note that the District Judge had other

reasons for rejecting Mr Marinescu's credibility, including a matter to do with his recollection of the gender of his lawyer at the time, and also that, subsequently, he alone of his family had not applied for settled status in the UK from which the District Judge drew an '*irresistible inference … that he did not want to bring himself to the attention of the Romanian authorities because he knew about the outstanding proceedings*.' The District Judge's entitlement to make adverse findings about Mr Marinescu's honesty and credibility in reliance on these particular matters were disputed at trial and before me. But even leaving them aside, I have no hesitation in concluding that, simply on the basis of the documentary evidence and the implausibility of Mr Marinescu's alternative version of the hearing he attended, alone, the District Judge was fully entitled to make the factual findings he did about those proceedings. So I must and do respect those findings.

44. The District Judge (at [85] of his judgment) was sure that Mr Marinescu attended court in Romania in June 2015, knowing he was a summonsed defendant. He admitted the offence in the face of the court at a considered hearing. He knew that formal pronouncement of guilt, and judgment on penalty, were set to follow. He left Romania within four months without informing the authorities, never to return even when his parents had been travelling to and fro at the same time. He made no contact with the Romanian authorities thereafter. He was open with the UK authorities, but that did not cause the District Judge to doubt that when he left Romania it was because he intended to avoid the consequences of the proceedings which he knew had not concluded, those consequences inevitably including conviction and sentence.

45. Those are factual findings which were undoubtedly open to the District Judge, and which I respect accordingly. They are the relevant facts to which I have to apply the guidance of the authorities, including ***Bertino***.

(ii) Applying the law

46. These facts are very far removed from those of ***Bertino*** itself. In that case, it will be recalled, the individual had left the country knowing only that he was under investigation for an offence. He was never officially informed he was even going to be prosecuted, nor in due course of the arrangements for his trial. Mr Marinescu, in clear contrast, had attended a criminal hearing at which he had pleaded guilty as charged, and at which his lawyer had entered submissions as to sentence. He knew that that hearing had been adjourned for judgment and sentence. But then he disengaged with the proceedings and shortly afterwards left the country.

47. As regards the resumed first instance hearing in July, I am satisfied there could hardly be a clearer *inferential* case of an individual unequivocally waiving his right to attend a hearing by deliberately absenting himself from it, knowingly and intelligently. He knew he could – indeed would – be treated as on notice of that future hearing if he did not make himself available for service. He knew he was set to be formally convicted on the basis of his guilty plea, and he knew that sentencing was the next step. He had been told as much in documents he had signed. He was legally represented. This is not a case of 'mere' or ignorant fugitivity, or simple failure of due diligence in ensuring he received notifications at the address he provided. He must, on the District Judge's findings, be taken to have known exactly what he was doing in deciding not to stay in touch about the July hearing nor, therefore, attend it.

48. But the parties agree the July hearing was not the relevant hearing, for present purposes. It is the December 2015 prosecution appeal hearing which forms the basis of the warrant under which his extradition is sought. The issue certified as arguable by Sir Duncan Ouseley, for the purposes of this appeal, is whether, applying *Bertino*, the necessary inference can be drawn from the facts of the present case that Mr Marinescu deliberately waived his right to attend *that* hearing. Sir Duncan noted Mr Marinescu's deliberate failure to maintain contact with the Romanian authorities when he moved to the UK, and raised the question of whether that in itself could support a finding of deliberate absence. He also raised as a potential issue what Mr Marinescu '*was told was the position in relation to an appeal which could lead to his sentence changing so radically, were he not to attend*'.

49. Miss Westcott, Counsel for Mr Marinescu, places heavy emphasis on the high bar to be cleared by a requesting state in establishing waiver of attendance to the necessary standard. She is right to do so. Article 6 is engaged, and waiver cannot be equivocal. It must be *knowing* – importing the foreseeability of the outcomes of the absence, and a commensurate understanding and assumption of the risks of non-attendance. She accepts that *Bertino* is careful to stop short of requiring *actual knowledge* that a hearing would take place in an individual's absence – much less of the precise details of any such hearing – before unequivocal waiver can be established. A person's behaviour '*of an extreme enough form*' might support an inference of unequivocal waiver, even so, on appropriately established facts. Miss Westcott says there is no evidence that Mr Marinescu had any idea about the appeal hearing, and that his behaviour was simply not '*extreme enough*', in all the circumstances, for the high bar to be cleared on an inferential basis.

50. The parties did not identify to me any recent case squarely on all fours with the present facts. Miss Westcott took me to some of the caselaw, both pre and post *Bertino*, in which courts found on the facts that individuals had *not* deliberately waived their rights to attend a hearing, and invited me to note the possible parallels with Mr Marinescu's circumstances. I have thought about the similarities and differences, and focused on the fact-sensitivity of the test.

51. What is notable about Mr Marinescu's case is just how far the proceedings had advanced before he disengaged from them, and how clearly foreseeable the practical consequences were. He had pleaded guilty, was expecting conviction to follow duly (subject to the point about which version of the code should be applied, a point ultimately decided in his favour) and was *expecting* to be sentenced. More than that, he was expecting to be sentenced on the basis of the prosecution facts and his lawyer's submissions in mitigation. Which is exactly what, in the event, transpired in his absence.

52. He knew that if he did not maintain contact with the judicial authorities these matters would be dealt with by way of deemed notification. He had been explicitly informed of his rights, told about the continuing nature of the criminal proceedings, and warned that he needed to remain engaged with the judicial authorities and was subject to their continuing jurisdiction. There can be no doubt that Mr Marinescu deliberately and clear-sightedly walked away from the sentencing exercise.

53. In the event, the Romanian criminal justice system ended up having to finalise his sentence in two stages, the court of first instance having been found to have gone wrong

and passed a sentence lower than it was properly entitled to. But in my judgment that does not make his waiver of his right to attend sentencing and remain engaged thereafter any the less voluntary, unequivocal and informed.

54. The position Mr Marinescu was left in after the June 2015 hearing was one in which there could, as I say, hardly have been a clearer inferential case of an individual deliberately assuming, on a fully informed basis, the jeopardy of absence. There is no basis whatever to support the counterfactual that he might have expected matters to rest where they stood when he last attended, on an indefinite and open-ended basis, or that his flight from the country was equivocal as to his wish to engage with his sentencing. On the particular facts of this case, as properly found by the District Judge and rehearsed above, the waiver of the right to attend and engage further with sentencing procedure was knowing, deliberate, unqualified and complete. The fact of the appeal stage does not make it any less so. It is not his 'mere fugitivity' which raises the basis for that inference, nor a failure of due diligence in staying in touch. It is his knowledge, expectation, and indeed his fully expressed desire, to be subjected to short-form sentencing with the attendant benefit of a sentence discount. That is what he got, including after the prosecution appeal stage. He waived his right to attend and further influence the sentencing procedure he had asked for. Instead, he deliberately prioritised evading its outcome, whatever it might be.

55. Again, the counterfactual – that while he may be taken clearly to have waived his rights at first instance, if the sentencing were unduly lenient and the prosecution appealed to rectify it he should fairly be understood not unequivocally to have waived a right to engage at that later stage – is fanciful, and impossible to reconcile with the facts. The facts are that he was unequivocally aware that he faced a sentence on the basis rehearsed before him, and signed up to by him, at the June hearing, and then walked away. '*This points towards circumstances which demonstrate that when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option.*' (*Bertino*, [58]).

56. A court can be sure on the facts of this case that Mr Marinescu unequivocally waived his rights, gave an unequivocal indication that he knew he was due to be sentenced, and evinced a plain and informed intention to take no part in *any* further procedure and to try to avoid serving *any* sentence imposed upon him. He deliberately absented himself from the procedure that transpired, for the purposes of s.20 of the Act. He has no entitlement to be discharged from extradition on this basis. That result is fully consistent with his Article 6 rights, which he waived. His appeal on this ground is dismissed.

(b) Ground 2 – private and family life (section 21 & Article 8)

(i) Was the District Judge's conclusion 'wrong'?

57. I remind myself of the limits of my task on an Art.8 appeal. Miss Westcott made many points of criticism of the District Judge's conduct of the *Celinski* exercise, of his articulation and evaluation of the various factors, and of his overall conclusion. But an appeal is not an open opportunity for recalibration of the weight a District Judge gave the various factors, whether on an issue-by-issue basis or overall. The weighing and

balancing were matters for him, unless the exercise was vitiated by error or beyond the spectrum of conclusions properly open to him on the materials before him and for the reasons he gave.

58. I can see from his judgment that the District Judge addressed himself to the relevant principles and conducted the balancing exercise by applying them to the facts as he had found them on the evidence before him. I can see that the District Judge took full account of the factors to which Miss Westcott draws particular attention: the considerable delays involved and their effect on Mr Marinescu and his family, and the individual situations of his wife, child and parents and the likely impact of extradition on them. I can see that on the other side of the balance the District Judge had identified weighty public interest considerations: the UK's treaty obligations and its commitment to achieving, and being seen to achieve, international criminal justice; the seriousness of the offending including its planning and co-ordination, the harm, loss and distress it had caused, and the commensurately substantial sentence imposed; and the fact that Mr Marinescu's otherwise blameless life in the UK and the family roots he had put down here were founded on fugitivity from justice from which the UK has no public interest in providing a safe haven.

59. Miss Westcott urges on me that the District Judge undervalued the gravity of the family factors and should have given them more weight. I can see that he *might* have given them more weight. I cannot see that he *must* have done. He focused with appropriate anxiousness on the situation of the child in particular, bearing in mind that Mr Marinescu was at the time the 'preferred parent' and substantial carer. He made an assessment of the impact of extradition on all the family members which was fairly based on the materials before him. He concluded that these could not be regarded *individually or cumulatively* as bringing down the balance against extradition, or that they materially exceeded the degree of harm and distress that enforced separation inevitably brings.

60. I cannot find fault in this of the dimensions justifying appellate interference. The '*anguish*' of family separation, particularly where there is neediness and dependency of any sort, was fairly acknowledged on the specific facts and evidence before the District Judge. His task was to weigh and balance that against all the other relevant factors. He was entitled to weigh Mr Marinescu's fugitivity and the seriousness of his offending heavily in the balance. The premeditation and meanness of his unpleasant acquisitive crime and the putative heartache of its many victims were relevant too. No suggestion was, or could be, made that his child's and family's circumstances would be such as to approach justifying diverting him from a custodial to a non-custodial disposal were he being sentenced there and then.

61. Giving permission to appeal on this ground, Sir Duncan Ouseley noted that '*there has been some delay since 2015; the child was born in 2018; there are problems in relation to the mother who would become the primary carer. The balancing exercise was done carefully, but this was the second attempt at lawful extradition. This ground is closely related to the abuse ground.*' I agree that the balancing exercise was done carefully at the time. Miss Wetscott put it to me that the 'second attempt' point ought to have been regarded as diminishing the proper public interest in extradition for the purpose of the *Celinski* exercise. I consider that issue more fully below. But it cannot otherwise be said that in all the circumstances it was not properly open to the District Judge to reach

the conclusions he did about the Art.8 challenge, on the materials before him, and for the reasons he gave.

(ii) The subsequent evidence

62. Sir Duncan Ouseley gave permission for witness statements of Mr Marinescu and his wife, dated 27th March 2024, to be adduced. These detailed (a) Mr Marinescu's elderly father's recent removal of rectal polyps, associated with diabetes-related anaemia; (b) his parents' recent visit to Romania so that his mother could have gallbladder surgery and avoid more time on UK waiting lists, and her post-surgery medication and recovery; (c) his son's satisfactory health and progress at school, said to be materially dependent on his own support; (d) his own stress and unhappiness having been on bail conditions for 2 years and four months; and (e) the strain of their current situation and Mrs Marinescu's progress with full-time studies and training to become a radiographer. The statements emphasise the pressures of their current uncertain situation on the whole family's wellbeing, and the feared impact of extradition on Mr Marinescu's parents' health, his son's continuing progress, and Mrs Marinescu's ability to cope with family responsibilities and her fears for the failure of her planned career.

63. Mr Marinescu now seeks to adduce further updating evidence by way of witness statements from himself and his wife dated 28th January 2025. There was no objection to my considering these *de bene esse* without prejudice to my decision as to whether, alone or in combination with the March 2024 updates, they satisfy the ***Fenyvesi*** test.

64. The latest statements detail (a) Mr Marinescu's father's continuing colon treatment and investigations; (b) his mother's continuing treatment in Romania; (c) the continuing impact of his bail conditions on his and his son's lives (his son will not stay away without him, and he himself is under curfew) and his inability to find work while his identity documentation is held by the court; (d) Mrs Marinescu having developed a chronic pain condition which is being investigated and medicated, and which has led her to be absent from her studies since January 2025.

65. (Shortly before the appeal hearing, I was further informed that Mrs Marinescu had attended her GP with symptoms of throat discomfort. No obvious abnormalities were noted, but she was counselled regarding cancer screening on account of her smoking history and given an urgent hospital referral for assessment. I was informed on 4th March 2025 that the outcome of the assessment was reassuring. There were no indications of cancer. A short course of antifungal medication was prescribed and no follow-up appointment was necessary.)

66. The case that Miss Westcott makes is that circumstances have moved on materially since the hearing before the District Judge in September 2023, and while these appeal proceedings have been pursued. Even if the Judge did not go 'wrong' in the weight he gave to these factors at the time, the balance should now come down against extradition. Mr Marinescu's parents have had health problems both before and after their surgical procedures, exacerbated by the associated travel to and from Romania. His son is doing well so long as his father can provide the primary care in the family, although seeing less of his grandparents. There are now real health concerns about his wife; she has already had a number of false career starts and her latest ambitions are now jeopardised by her own health and what would be her caring responsibilities for their son should Mr

Marinescu be extradited. There are also now the lengthening months Mr Marinescu has spent on bail.

67. I take the admitted and the proposed updates in the round. I bear in mind that I have to focus on changes in the last 18 months – matters not already considered by the District Judge.

68. So far as the family updates are concerned, the District Judge had factored in that Mr Marinescu's parents were frail and that their health was further deteriorating; the latest update is that their '*health is declining but they are trying to look after each other the best way they can*'. There are continuing concerns and their respective conditions are being further treated and managed. The District Judge had also factored in Mr Marinescu's close bond with his son, but found that Mrs Marinescu would be able to meet his immediate physical and emotional needs. His son is a little older now, but no material new issues are reported in relation to his progress. Mr Marinescu's wife, however, has new health concerns of her own now (although thankfully not as grave as those that were feared possible at the time of the hearing).

69. The family updates, both individually and taken as a whole, indicate gradations of the evidence before the District Judge. It is not said there has been a definitive supervening change in the quality and degree of the family's dependencies on Mr Marinescu; it is a matter of confirming that the past issues have not improved and may be deteriorating. His wife's pain condition, which is currently under investigation, *is* a new factor which introduces further uncertainty and appears independently to have impacted her career plans. But I do not have evidence that she cannot now care for their son or is no longer in a position to meet his needs and to support them both, albeit in reduced and adverse circumstances of further uncertainty. The new material does not go that far.

70. If a fresh *Celinski* exercise were now undertaken, the principal factors in favour of extradition would remain the same as they were at the extradition hearing: the powerful UK public interest in furthering our extradition treaties, including affording partner judicial authorities the same confidence and respect that we expect to be accorded in our turn; the seriousness of Mr Marinescu's organised, co-ordinated and predatory offending; the length of the sentence outstanding; and the fugitivity on which Mr Marinescu has founded his family life. The UK has a powerful public interest in not being, nor being thought of as, a safe haven for runaway offenders.

71. The principal factors against extradition remain the interests of Mr Marinescu and his close family in continuing to live the constructive and blameless life they have established here in the lengthening years since his offending. These interests include: (a) the important best interests of Mr Marinescu's young son, who will be emotionally impacted by his father's absence, and who will have to rely on his mother alone for his immediate and day to day nurturing; (b) the impact on Mrs Marinescu of becoming that lone parent, without the support of her husband for herself and her son, and at a time of uncertainty about her healthiness and her career, and (c) the impact on Mr Marinescu's elderly parents who both have health concerns.

72. In balancing these opposing factors, I entirely see that extradition will be no easier for this family than it was 18 months ago, and in some respects will be harder and may continue to grow harder. I can also see that the longer this case has gone on the more the litigation has placed a strain on the family and the more the restrictions on Mr

Marinescu have been felt. (I am told however that Mr Marinescu's bail conditions are not of the most onerous: he is under home curfew between 11pm and 3am, and is able to apply for ad hoc relief from that restriction, for example to go on holiday.) That is at least in part why the law does not readily encourage the admission of subsequent Art.8 evidence into extradition appeal procedure with the attendant hope of continuing recalibration of the balancing exercise, unless it is unequivocal and potentially determinative.

73. But the original *Celinski* exercise, properly undertaken as I have found it to be, was not a finely balanced one in this case. Recalibrating it now, I cannot say, taking into account both the factors at the time of the extradition hearing and the new materials now before me, that the post-hearing deteriorations in the family's situation are such as should bring the balance down against extradition. The public interest factors in favour of extradition continue to be heavily weighty, and any court, including an appeal court, is obliged to recognise that. All families founded on fugitivity are at inherent risk of the hurt and harm and disappointment of separation by extradition. Extradition will nevertheless go ahead unless, in all the particular circumstances of the individual and the family, the interests of justice and public interests engaged on the side of extradition are overbalanced by a disproportionate impact on a family. I cannot find the balance falls that way in the present case.

74. I have to bear in mind that the *Fenyvesi* test is a strict one. Before admitting the latest proposed updates I would have to be satisfied they would produce a different outcome and result in Mr Marinescu's discharge. It is not enough that they *might* have made a difference. For the reasons given, I cannot be satisfied that the latest updates must have made a difference and resulted in Mr Marinescu's discharge from extradition. This is therefore equivocal and not potentially determinative evidence. It does not pass the *Fenyvesi* test.

75. I would therefore refuse the latest application to admit fresh evidence and, for the reasons set out above, dismiss this ground of appeal. Before finally concluding on this point, however, I turn to consider the third ground which Sir Duncan observed to be *closely related* to this one.

(c) Ground 3 – Abuse of process

76. The thrust of Miss Westcott's submissions was that this was a 'second bite of the cherry' case which, consistently with *Rymarski*, had to be regarded as an abusive attempt to relitigate the previous extradition hearing - an impermissible collateral attack upon the earlier judgment of District Judge Heptonstall, conferring an unfair litigation disadvantage on Mr Marinescu.

77. I can see from his judgment that the District Judge correctly identified the relevant authorities and addressed himself to the 'broad, merits-based test' they indicate – identifying factors pointing to an abuse conclusion, factors against, and coming to an evaluative conclusion accordingly. No error of law appears in that.

78. But this is another highly fact-sensitive exercise. The facts here were that the original warrant had lacked particularity, and that had been raised on Mr Marinescu's behalf at an early stage in the extradition proceedings; further information had been sought at the time, but of limited scope. Permission to appeal had been refused, including for those

reasons. The District Judge found on the basis of the documentary evidence that the relevant details sought had been readily available and the defect easily remediable, and that the attendant litigation delays and uncertainty had lengthened Mr Marinescu's bail restrictions and the pressures on the family. These were all factors the District Judge acknowledged to weigh in favour of an abuse finding.

79. Against those factors, he weighed the fact that the first time around the court had not itself requested further information about the particulars of the company and contracts involved so there had been no circumvention or breach of directions. Delays had occurred at least in part because of related litigation in Romania on Mr Marinescu's behalf. He himself had been aware straight away of the possibility of reissue, and that process had been relatively swift after the refusal of permission to appeal. His offending had been serious, and he could not have expected the authorities simply to abandon extradition. He had been given no false sense of security. And his fugitivity was itself a weighty matter.

80. The District Judge performed an overall balancing exercise. He said this, in the first place (at [131]):

> (i) This is a second bite of the cherry case as the judicial authority is seeking to remedy a deficiency that it did not acknowledge and could have easily remedied. It was with information that should have been available. This goes directly to the point on which the appeal was refused so it is a collateral attack. That is a matter of significant weight.
>
> (ii) There is a powerful public interest in finality in all litigation and expedition in extradition cases. These would be undermined in this process.

81. Against that, he set the factors of the lack of any previous court direction as reducing the power of any abuse argument; the impact on the family was a material factor properly evoking sympathy, but ultimately was '*not very strong*'; there was a minimal false sense of security issue of '*negligible weight*'; the nature and seriousness of the offending were '*weighty factors*'; and Mr Marinsecu's fugitivity, together with the public interest in the UK's not being seen as a safe haven for fugitives, '*remains a powerful factor in the public interest, with only moderate dilution from the failure of the first set of proceedings*'.

82. It is the first two factors in favour of an abuse finding, cited above, which go most centrally to Miss Westcott's argument from *Rymarski*. The facts of that case were, however, strikingly different. What stands out is that the procedure there produced two successive rulings by different District Judges which were simply irreconcilable precisely because there had been no material change of circumstance. And there had been no appeal. The second decision was therefore itself a disguised appeal. The procedure was essentially a roll of the dice to get a different result from a different Judge on what was essentially the same basis.

83. That is not the present case. It *is* material that the defects of particularity in the present case need not have arisen in the first place: a requesting state is under a clear obligation to get things right the first time. But here there *had* been an attempted appeal, and that

had confirmed that there was a lack of particularity not remediable otherwise than by discharge and reissue. That is what then happened, undertaken, as the Judge found, without *undue* delay and on a basis giving no illusion of comfort to Mr Marinescu in the process. The reissued warrant had remedied the defects of particularity. The second proceedings were not therefore a rerun of the first: there has been a material change. Nor was it an attempt to avoid any directions of the court.

84. In these circumstances, although the District Judge himself used the expression '*collateral attack*', it was not really any such thing. That term should properly be reserved for reissued warrants which are avoidance devices – backdoor routes to different results from those a court has decided otherwise, and for which consequential litigation steps have already been provided. The reissued warrant in this case was not a backdoor device. It was not trying to relitigate by way of avoiding extant court orders or appeal procedure; there were none of the former and the latter had been exhausted. It was entirely a front door device. It is perfectly proper, in principle, for an arrest warrant a court has found to lack material detail to be taken away and reissued with those details remedied. Whether *overall* that is abusive or not depends on all the individual and relevant circumstances of a case – the *broad, merits-based approach*.

85. The Judge here addressed all of those circumstances and reached a *broad, merits-based* conclusion. He properly acknowledged the responsibility of the requesting state for taking two goes to get the warrant right, and gave significant weight to the burden that placed on Mr Marinescu and indeed the justice system. He also properly gave weight to the absence of substantive collateral attack, notwithstanding his own mislabelling; the only relevant litigation advantage here was the patent one of the requesting state being enabled to get the warrant right in the end. Whether that was overall unfair and abusive, or not, was a matter for full contextual evaluation, not an intrinsic quality arising from any misuse of litigation procedure.

86. That was exactly the contextual evaluation the District Judge properly undertook. It discloses no error. The outcome was within the range of conclusions properly open to him on the materials before him and for the reasons he gave. Mr Marinescu's appeal cannot succeed on this ground.

Conclusions

87. I stand back finally to consider this case in the round. As a case of extradition on a *reissued* warrant, Mr Marinescu's inevitably involves a protracted litigation history on that account alone. The antecedent litigation history in Romania was also protracted by prosecution appeal procedure and by Mr Marinescu's own fugitivity. The present appeal procedure has added more than a further year of delay.

88. All of these delays, individually and collectively, have an inherent tendency to dilute the public interest in an extradition – or, to put it another way, have a tendency to impede the realisation of the public interest in the administration of international criminal justice. Nor have the delays made Mr Marinescu's extradition any easier to face for him and his family. Mr Marinescu committed his offence as a young, single man of 23. He is now a family man of 39. He has tried to live as if his past was behind him. But as a fugitive from justice, that was not ultimately his decision to make, and not a promise that he could confidently keep or others could confidently rely on. His extradition after all this time will have difficult consequences for him and his family.

But a court is obliged to balance that against other important considerations, including those of securing justice for the victims of his offending.

89. The District Judge was acutely aware of the delays in the history as it appeared before him, and the detailed reasons for them, and I am highly conscious of them also. The District Judge had them firmly in mind as he reflected on the evaluative exercises it properly fell to him to undertake – all of them highly fact-sensitive. An appeal is not an opportunity to rehear a case all over again. On the examination I am required to make by appeal proceedings, I cannot find that the District Judge went wrong in any respect the law would recognise as justifying an appeal court setting aside his decision-making. Nor have I been able to find on the materials given to me that developments in Mr Marinescu's family life since then can or should produce a different result.

90. The District Judge found that extradition would not be inconsistent with Mr Marinescu's rights not to be dealt with in his absence, nor with his and his family's rights to continue to live as he has chosen to. He found that Mr Marinescu's extradition would not be an abuse of process. He was entitled to reach those conclusions. I find no proper basis for disturbing them. Mr Marinescu's appeal is dismissed.

91. I am grateful to Counsel for their detailed and constructive submissions, and for the assistance provided in anxiously examining this case. I am satisfied Miss Westcott put Mr Marinescu's case at its highest.