Neutral Citation Number: [2025] EWHC 864 (Admin)

Case No: AC-LON-001112

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/04/2025

Before :

MR JUSTICE RITCHIE

- -

Between :

MIRCEA GEORGESCU	**Claimant**
- and -	
CONSTANTA TRIBUNAL, ROMANIA	**Defendant**

- -
- -

Ben Joyes (instructed by **Hollingsworth Edwards**) for the **Appellant**
Tom Davies (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 1.4.2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on Wednesday 9th April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Ritchie:

The Parties

1. The Appellant is a Romanian man who is married and has one son. The son is married and has two small children. They all live in Kent. He was convicted of a crime in Romania in 2018 and fled to the UK before the trial. The Respondent is a Romanian Judicial Authority who wish to have him extradited from the UK to serve his prison sentence in Romania. Thus, the Respondent is the requesting judicial authority (RJA).

The Appeal

2. By a notice of appeal dated 3.4.2024 the Appellant seeks to overturn the decision made by District Judge Leake (the Judge) at Westminster Magistrates Court on 28.3.2024 extraditing him back to Romania to serve a 2 year sentence for tax evasion. S.26 of *the Extradition Act 2003* (the *EA03*) provides a right to appeal on questions of fact or law. The Appellant was found by the Judge to have fled Romania to the UK in February 2017 after being charged with evading tax and making a plea with the police or the RJA in October 2016, whilst he was in prison for other offences. He was released in December 2016. The Judge found that he was and is a fugitive (a finding which is not appealed) and so could not rely on S.14 of the *EA03* to avoid extradition on the basis that extradition would be unjust or oppressive. As Lord Diplock ruled in *Kakis* v. *Government of the Republic of Cyprus* [1978] 1 WLR 779, at pages 782-783:

> "Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them."

3. The Appellant seeks to overturn the balancing exercise carried out by the Judge under S.21 of the *EA03*, which involved consideration of his rights under Article 8 of the European Convention on Human Rights (Art.8). The Judge decided that the factors in favour of extraditing the Appellant to serve his sentence were heavier than the Art. 8 and other factors weighing against extradition. The Appellant relies on his accrued human rights in the UK exemplified by his family life here and he relies on the (1) delay since his offence; and (2) "culpable and unexplained" delay caused here in the UK since 2017 in issuing an NCA certificate, which is a necessary step before a foreign convicted national can be arrested and extradited.

Bundles

4. For the hearing I was provided with an appeal bundle, an authorities bundle, two skeleton arguments and then two last minute applications and a supplementary bundle.

The Issues

5. There is really only one issue in this appeal. That related to whether the Judge applied the wrong test when balancing the factors under S.21 of the *EA03* and/or excluded delay (or the effects of the delay) from the balancing exercise. The grounds of appeal were not really boiled down to that issue but as the hearing progressed that became more apparent.

6. The Appellant submitted that the Judge applied the wrong test. At paras. 51, 96, 97 and 99 the Judge used an "on/off switch" test for the delay factor triggered by his decision that the Appellant was a fugitive. Whereas the Appellant submits that a "titration test" would have been the correct one, under which over 5 years of delay, or the effects thereof, should have been a material and decisive factor weighing in the Appellant's favour.

7. In response the Respondent submits that delay is only relevant in so far as it creates the effect of increasing, or enhancing the Appellant's family life, family roots and ties and entrenches the Appellant's Art.8 rights. The Respondent submits that there is no right for a fugitive to require the Court to enquire into the cause of the delay. Finally, the Respondent submits that the delay, long though it was, arose from the Appellant fleeing Romania to avoid serving his soon to come sentence. The cause of the delay, whether it was by the RJA or, as in this case, the executing judicial authority (EJA), is not relevant. Only the effect is relevant for the S.21 balancing exercise and the Judge took the effect fully into account.

The approach in this appeal

The right to appeal

8. The *EA03* provides:

> "**S. 26 Appeal against extradition order**
> (1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.
> (2) ….
> (3) An appeal under this section—
> (a) may be brought on a question of law or fact, but
> (b) lies only with the leave of the High Court."

Leave to appeal

9. Leave to appeal is required under S.26 of the *EA03*. To grant leave to appeal the Court has to determine whether any of the grounds is reasonably arguable, see Rule 50.17(4)(b) of the *Criminal Procedure Rules*. Permission was granted by Hill J on 17.9.2024 on the one ground under Art.8 of the European Convention on Human Rights.

10. **The test on appeal**

> **"S. 27 Court's powers on appeal under section 26**
> (1) On an appeal under section 26 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 appropriate judge ought to have decided a question before him at the extradition hearing differently;

(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.

(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 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.

(5) If the court allows the appeal it must—

order the person's discharge;

quash the order for his extradition."

So, in summary, under S.27 of the *EA03* the High Court has the power to allow an appeal:

(1) for issues raised at the hearing, if the appeal court decides that the judge ought to have decided a material question differently and the effect of that error would have led to the Appellant's discharge; or

(2) for (a) a new issue which was not raised, or (b) for new evidence which was not available at the hearing, if the appeal court decides that it would have resulted in a material question being decided differently and as a result the judge would have discharged the Appellant.

11. Appeal by way of review not rehearing

The procedure on appeal is a review not a rehearing. The way the S.27 words have been interpreted in the past by the higher appellate courts, on issues decided at the hearing, is to ask whether the Judge's decision was wrong, namely, whether the Judge erred in such a way that he ought to have answered the statutory question differently.

12. When determining how to approach the words: "ought to have decided a question differently" and proof that this would have led to discharge of the extradition, in appeals on the balancing exercise under S.21 of the *EA03* and Art 8., guidance from another field of law has been incorporated into this field. The guidance was given in *Re B (A child) (Care proceedings: threshold criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 (SC) by Lord Neuberger:

> "93 … There is a danger in over-analysis, but I would add this. 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).
> 94. As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. 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." (My emboldening).

13. In *Dunham v USA* [2014] EWHC 334 (Admin) Beatson LJ ruled on the proportionality balancing exercise carried out under S.21 thus:

> "66. … In *Re B (A Child) (FC)* [2013] UKSC 33 a majority of the Supreme Court held that an appellate court should treat the determination of the proportionality of an interference with the rights protected by the ECHR as an appellate exercise and not a fresh determination of necessity or proportionality, notwithstanding the duty of the court as a public body to consider human rights."

14. In *Belbin v Regional Court of Lille, France* [2015] EWHC 149 (Admin), in the Divisional Court, Aikens LJ confirmed the correct approach as follows:

> "66. In our view Beatson LJ was correct in suggesting that it is the "review" approach that should be taken by this court when it is considering an appeal from the conclusion of the District Judge on an issue of Article 8

> "proportionality" in an extradition case. Under section 27(3) of the EA this court can only allow an appeal if it concludes that the "appropriate judge" should have decided a question before him at the extradition hearing differently. In this context the relevant "question" is whether the extradition of the requested person would be disproportionate to the interference it would have with his (and, if relevant, his family's) Article 8 rights. If, as we believe, the correct approach on appeal is one of review, then we think this court should not interfere simply because it takes a different view overall of the value-judgment that the District Judge has made or even the weight that he has attached to one or more individual factors which he took into account in reaching that overall value-judgment. In our judgment, generally speaking and in cases where no question of "fresh evidence" arises on an appeal on "proportionality", a successful challenge can only be mounted if it is demonstrated, on review, that the judge below; (i) misapplied the well established legal principles, or (ii) made a relevant finding of fact that no reasonable judge could have reached on the evidence, which had a material effect on the value-judgment, or (iii) failed to take into account a relevant fact or factor, or took into account an irrelevant fact or factor, or (iv) reached a conclusion overall that was irrational or perverse."

15. The general principles were summarised in *Celinski v Poland & Ors* [2015] EWHC 1274 (Admin), by Lord Thomas CJ, at paras 21- 24, in particular:

> "24. The single question therefore for the appellate court is whether or not the district judge made the wrong decision. It is only if the court concludes that the decision was wrong, applying what Lord Neuberger said, as set out above, that the appeal can be allowed. Findings of fact, especially if evidence has been heard, must ordinarily be respected. In answering the question whether the district judge, in the light of those findings of fact, was wrong to decide that extradition was or was not proportionate, the focus must be on the outcome, that is on the decision itself. Although the district judge's reasons for the proportionality decision must be considered with care, errors and omissions do not of themselves necessarily show that the decision on proportionality itself was wrong."

16. In *Lauri Love v USA* [2018] EWHC 712 (Admin), in relation to an extradition appeal, the Lord Burnett of Malden CJ and Ouseley J Divisional Court ruled that:

> "26. The true approach is more simply expressed by requiring the appellate court to decide whether the decision of the district judge was wrong. What was said in *Celinski* and *Re B (A Child)* are apposite, even if decided in the context of article 8. In effect, the test is the same here. The appellate court is entitled to stand back and say that a question ought to have been decided

> differently because the overall evaluation was wrong: crucial factors should have been weighed so significantly differently as to make the decision wrong, such that the appeal in consequence should be allowed."

17. Following this guidance, I shall be applying a review test to this appeal to determine: (1) whether the Judge's decision under S.21 was wrong or unsupportable because he ought to have decided the question differently and (2) whether this would have led to the Appellant being discharged from extradition. I will not not interfere simply because I take a different view of the value judgment.

De Novo consideration

18. The procedure is modified in cases involving "new issues", fresh evidence or a relevant change of circumstances, such that the appellate court is required to make its own assessment *de novo* as to whether extradition is barred on any one or more relevant ground available under the *EA03*, see *Kozar v Czech Republic* [2024] EWHC 2226 (Admin) at [14], per Julian Knowles J. I shall deal with the two applications below in relation to this approach.

The procedure

19. In such extradition cases the procedure is governed by the *Criminal Procedure Rules*, and in particular Part 50. I must bear in mind that under r.50.2 there are two special objectives:

> **"Special objective in extradition proceedings**
> 50.2. When exercising a power to which this Part applies, as well as furthering the overriding objective, in accordance with rule 1.3, the court must have regard to the importance of—
> (a) mutual confidence and recognition between judicial authorities in the United Kingdom and in requesting territories; and
> (b) the conduct of extradition proceedings in accordance with international obligations, including obligations to deal swiftly with extradition requests."

The second objective is obviously relevant to cases involving delay by JAs.

The judgment below

20. **The burden of proof** in the Court below was to the criminal standard. I take that into account. None of the Judge's findings of fact are appealed. I set out the factual chronology below. I shall refer to the paragraph numbers in the judgment thus: para 1 will be "J1" and so on.

21. In July/August 2009, in Romania, the Appellant failed to account for 176,131 leu during the course of a business run through a company. He, or his company, avoided paying income tax and VAT amounting to 51,803 leu. At the current exchange rate those figures

equate to around £29,900 and £8,800. Whilst he was in prison, where he was incarcerated between 2013 and 2017 for other offences, he was interviewed on 21.1.2016 and told he was a suspect in the relevant tax evasion investigation. Whilst he was still in prison, on 11.10.2016, he negotiated a guilty plea/s with the RJA/police, having been told that he was a Defendant. He was told he was obliged to report when required and would be arrested if he did not and was obliged to give 3 days' notice of change of address. He was not required to stay in Romania. He knew that the trial would go ahead if he did not turn up. He knew he would be punished. At that time, had he been free, he would have been living at his mother's address at Strada Nico Mandai, 23, Constanta (Number 23). He knew that he would be served at Number 23. When he was in the UK his neighbours signed for official mail and the Appellant knew some had been received there. He left Romania shortly after his release from prison on 19.12.2016 and came to live in the UK in February 2017. He did not tell the Romanian police or RJA of this change. He failed to appear at his trial but the State appointed a lawyer for him. He appealed after his conviction and failed to appear at the appeal. All Court documents were served at Number 23, which his family still owned. At some stage his mother died and his son took ownership of Number 23. He was convicted of the offences in November 2017. His appeal failed in February 2018 and the sentence was made final on 8.2.2018. He never asked the police about the case. When accused in cross examination by counsel, of fleeing to make enforcement difficult, he responded that it was "their problem". An imprisonment warrant was issued on 8.2.2018. The European Arrest Warrant (EAW) was issued on 22.2.2018.

22. The Judge considered the evidence, rejected much of the Appellant's evidence and found him to be a fugitive, using the correct legal definition. He had knowingly placed himself beyond the reach of the RJAs by fleeing the country thereby concealing his whereabouts and evading arrest. Therefore the Appellant could not rely on the S.14 bar to extradition.

23. The Judge held that the EAW was validly issued by the RJA. But, the NCA did not certify the EAW until 5 years and 4 months later, on 27.6.2023 and the Appellant was arrested 5 months thereafter, at his home in Maidstone, Kent on 12.11.2023 by PC Norris. Bail was granted the next day and he was tagged with a curfew from 11 pm to 5 am each night.

24. The case progressed to the extradition hearing on 13.3.2024. the Judge handed down judgment on 28.3.2024 and made an extradition order. The Judge had heard the Appellant's evidence live. He was particularly struck by how, when asked about fleeing Romania, the Appellant had said that was "their problem". The Judge determined that: (1) the crimes for which he was convicted had dual criminality with crimes in the UK (not appealed); (2) there was no S.11 *EA03* bar (not appealed); (3) no S.14 bar applied and under S.20 *EA03*, the Appellant deliberately absented himself and was a fugitive (not appealed); (5) a specific assurance was given about the Appellant's treatment in prison where he was to be extradited (not appealed).

25. The Judge then considered the factors under S.21 of the *EA03*. He took into account the guidance in *Norris v Government of USA (No.2)* [2010] UKSC 9; *H.(H.) v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25; and *Polish Judicial Authorities v Celinski [2015] EWHC 1274 (Admin)*. He summarised the law thus:

> "92. The warrant in this case is a conviction warrant. In these circumstances, I direct myself as follows:
> (1) When considering whether extradition would be a proportionate interference with the rights guaranteed by Article 8, the public interest in extradition weighs heavily in the balancing exercise since the public interest in upholding bilateral extradition treaties would otherwise be "seriously damaged." (Unanimous holding in *Norris*).
> (2) The question arising under Article 8 is always whether the interference with the private and family lives of the requested person and other members of their family is outweighed by the public interest, (*H.(H.)* at [8](3)).
> (3) There is no test requiring exceptionality to be found for a conclusion to be reached that the interference outweighs the public interest, (*H.(H.)* at [8](2)).
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that the UK should honour its treaty obligations to other countries; that there should be no "safe havens" to which either can flee in the belief that they will not be sent back (*H.(H.)* at [8](4)).
> (5) The public interest in extradition will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the extradition offence(s) alleged (*H.(H.)* at [8](5)).
> **(6) The delay since the alleged extradition offence may both diminish the weight to be attached to the public interest and increase the impact upon private and family life (*H.(H.)* at [8](6)).**
> (7) It is likely that the public interest in extradition will outweigh the Article 8 rights of the family "unless the consequences of the interference with family life will be exceptionally severe" (*H.(H.)* at [8](7)).
> (8) Courts applying the principles in *Norris* and *H.(H.)* when conducting the balancing exercise must bear in mind that:
> (a) *H.(H.)* concerned the interests of children and the judgment of the Supreme Court should be read in that context;
> (b) the public interest in ensuring that extradition arrangements are honoured is very high, as is the public interest in discouraging persons seeing the UK as a State willing to accept fugitives from justice;
> (c) the decisions of a judicial authority of a party to the TCA making the request should be accorded a proper degree of mutual confidence and respect;

(d) there must be respect for the independence of prosecutorial decisions in the category 1 territory; decisions on whether to prosecute an offender in England and Wales are on constitutional principles ordinarily matters for the independent decision of the prosecutor (save in very limited circumstances) and challenges to those decisions are generally only permissible in the pre- trial criminal proceedings or the trial itself;

(e) factors that mitigate the gravity of the offence or culpability will ordinarily be matters that the court in the requesting State will take into account; although personal factors relating to family life will be factors to be brought into the balance under Article 8, the court must also take into account that these will also form part of the matters considered by the court in the requesting State in the event of conviction. (See *Celinski* at [5]-[12])

(9) **Where it has been established to the criminal standard of proof that the requested person is a fugitive, the important public interests in upholding extradition arrangements, and in preventing the UK being a safe haven for fugitives, would require very strong counter-balancing factors before extradition could be disproportionate** (see *Celinski* at [39]).

(10) In conviction warrant cases:

(a) the court at the extradition hearing will seldom have the detailed knowledge of the proceedings, background or previous offending history of the offender that the sentencing court will have had had;

(b) it will rarely be appropriate for the court in the United Kingdom to consider whether the sentence imposed by the requesting judicial authority was significantly different from that which a United Kingdom court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been. (See *Celinski* at [13])

(11) Extradition is, by its nature, very likely to have adverse consequences for the private or family life of the requested person and so the "mere existence of some adverse consequences will not be a sufficient counterweight, where there is a strong public interest in extradition" (per Lord Mance in *Norris* at [106])." (My emboldening).

26. The Judge then summarised the factors relied upon by each party, see J93 and J94. Delay was specifically considered in J95, as were two cases: *Kortas* and *Ristin*, to which I shall return below. It was submitted by the Respondent that there was no "on/off" switch for fugitives in relation to delay within the S.21 balancing exercise, it was more nuanced and the two were linked. Any delay arising in the context of fugitivity meant that the delay counted for little in the factors in favour of the Appellant. The Judge's decision was made at J96-97 and J99-100. The Judge specifically considered delay at J96 and ruled that it arose from his fugitive activity. The Judge did

not list delay in the factors weighing in favour of the Appellant. The Judge decided that the balance of the factors weighed in favour of extradition. He took into account the weighty public interest in honouring treaty obligations, the public interest in mutual respect and confidence between States, the seriousness of the offences, the 2 year unserved sentence and the need for the UK not to be seen as a safe haven for fugitives from justice. He considered that those outweighed the established life the Appellant had set up in the UK with his wife, son and grandchild.

27. I note that the Judge did not find that the Appellant and his family would suffer exceptionally serious interference with his family life, which is the criterion set out by Lady Hale in *R (HH) v Genoa* [2012] UKSC 25, at para. 8(7).

The Grounds of Appeal

28. The only ground of appeal related to S.21 of the *EA03* and Article 8. Having summarised the law set out in *HH v Genoa, Norris v USA* and *Dunham v USA*, the Appellant relied upon the "six years delay" caused by the NCA, which the Appellant described as "disgraceful". The Appellant relied, by comparison, upon the various first appeal decisions in: *Miller v Poland* [2016] EWHC 2568 (Admin) [para. 5]*; Zimackis v Poland* [2017] EWHC 315 (Admin) [paras. 25-26]*; Wolack v Poland* [2014] EWHC 2278 (Admin) [paras. 9, 22]; *Slawonir v Poland* [2014] EWHC 4346 (Admin) and *Valdas v Lithuania* [2016] EWHC 16 (Admin) [para. 24]. The Appellant submitted, as a matter of law, that delay could still weigh in the S.21 balancing exercise, despite the fact that the Appellant was a fugitive, and relied for that submission upon *Tomaszewicz v Poland* [2013] EWHC 3670 (Admin) [paras. 16, 17], and *Juszczak v Poland* [2013] EWHC 526 (Admin), [paras. 13 to 15]. The Appellant also relied on the curfew and the suggested lack of seriousness of the offences as part of the balancing exercise. The curfew point had not been raised at the hearing below. In relation to delay, the Appellant submitted that the Judge gave no weight to delay and relied upon the decision of Collins J in *Miller v Poland* [2016] EWHC 2568 (Admin), in which delay by the executing judicial authority (EJA) led to discharge, despite fugitive status:

> "7. This appellant was properly regarded as a fugitive. So far as any delay in Poland is concerned, that would weigh little in his favour in considering his Article 8 claim. But the situation is somewhat different when one considers delay by the NCA or its predecessor. The fact that he was a fugitive, of course, is material but it is not a matter which can weigh so heavily against him when one is considering delay which ought not to have occurred but which was not the responsibility of the requesting State."

29. In effect, the Appellant submitted that the Judge was wrong to find that fugitivity trumped delay by an LJA and failed to put any weight on delay despite the fact that it was caused by the NCA and had lasted over five years.

30. The Respondent submitted that, because the Appellant was a fugitive, and because Article 8 was not allowed to circumvent the effect of S.14 of the *EA03*, little weight could be given by the Judge to the delay in this case. The Respondent submitted that, in fugitivity cases the Court should not enquire into the causes of delay by an EJA or questions of who was culpable for any such delay and should not entertain allegations by fugitives that EJAs should have acted more expeditiously. The Respondent relied on the following cases to make good that submission: *Kakis v Cyprus* [1978] 1 WLR 779 at pps 782-783; *Gomes and Goodyer v Government of the Republic of Trinidad & Tobago* [2009] 1 WLR 1038 (HL) at paras. 26 - 27; *Wanagiel v Poland* [2018] EWHC 3370 (Admin) at para. 10, *RT v Poland* [2017] EWHC 1978 (Admin) at para. 62; *Cis v Poland* [2022] EWHC 980 (Admin) at para. 24.

The Law

S.14 of the *EA03* and delay

31. The cases on delay relating to S.14 of the *EA03* are of some relevance. S.14 provides that extradition is barred if, by reason of the delay since the crime and since the absconding, it appears that it would be *unjust or oppressive* to extradite the requested person. The decision of the Judge which is appealed does not relate to S.14, but the case law on S.14 is relevant. The predecessor to S.14 was in the *Fugitive Offenders Act 1967.* In *Kakis v Cyprus* [1978] 1 WLR 779 (HL), Lord Diplock, when allowing an appeal against extradition, gave guidance on delay. The appellant was accused, not convicted and asserted that he could not get a fair trial in Cyprus. He was accused of being involved in a coup, hid in the hills, then fled the country. Lord Diplock stated that the appellant was not responsible for any of the delay and ruled thus at page 782-783:

> “"Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, "oppressive" as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair. Delay in the commencement or conduct of extradition proceedings which is brought about by the accused himself by fleeing the country, concealing his whereabouts or evading arrest cannot, in my view, be relied upon as a ground for holding it to be either unjust or oppressive to return him. Any difficulties that he may encounter in the conduct of his defence in consequence of the delay due to such causes are of his own choice and making. Save in the most exceptional circumstances it would be neither unjust nor oppressive that he should be required to accept them. As respects delay which is not brought about by the acts of the accused himself, however, the question of where responsibility lies for the delay is not generally relevant. What matters is not so much the cause of such delay as its effect; or, rather, the effects of those events which would not have happened before the trial of the accused if it had taken place with ordinary promptitude. So

> where the application for discharge under section 8 (3) is based upon the "passage of time " under paragraph (b) and not on absence of good faith under paragraph (c), the court is not normally concerned with what could be an invidious task of considering whether mere inaction of the requisitioning government or its prosecuting authorities which resulted in delay was blameworthy or otherwise. Your Lordships have no occasion to do so in the instant case."

32. Lord Diplock set out three principles on delay and S.14: (1) delay caused by the convicted person fleeing his trial or sentence cannot be relied upon by him under S.14, save in the most exceptional circumstances. (2) Delay caused by others can be relied upon by him in relation to the creation of injustice or oppression. (3) There is generally no justification or need for an investigation into the requesting State's or the receiving State's behaviour or conduct in causing the delay. The focus is on the effect of the delay. Lord Edmund-Davies did not agree with (3) and considered conduct to be relevant (see page 785D).

33. In *Gomes & Goodyer v Trinidad* [2009] 1 WLR 1038, the House of Lords again considered delay in a S.14 case. The District Judge decided to extradite the appellants. The House of Lords upheld that decision. Lord Brown gave the lead judgment and, having analysed *Kakis,* ruled thus:

> "26 … If an accused like Goodyer deliberately flees the jurisdiction in which he has been bailed to appear, it simply does not lie in his mouth to suggest that the requesting State should share responsibility for the ensuing delay in bringing him to justice because of some subsequent supposed fault on their part, whether this be, as in his case, losing the file, or dilatoriness, or, as will often be the case, mere inaction through pressure of work and limited resources. We would not regard any of these circumstances as breaking the chain of causation (if this be the relevant concept) with regard to the effects of the accused's own conduct. Only a deliberate decision by the requesting State communicated to the accused not to pursue the case against him, or some other circumstance which would similarly justify a sense of security on his part notwithstanding his own right from justice, could allow him properly to assert that the effects of further delay were not "of his own choice and making".
>
> 27. There are sound reasons for such an approach. Foremost amongst them is to minimise the incentive on the accused to flee. There is always the possibility, often a strong possibility, that the requesting State, for want of resources or whatever other reason, may be dilatory in seeking a fugitive's return. If it were then open to the fugitive to pray in aid such events as occurred during the ensuing years - for example, the disappearance of witnesses or the establishment of close-knit relationships - it would tend rather to encourage flight than, as must be the policy of the law, discourage

> it. Secondly, as was pointed out in Diplock para 2, deciding whether "mere inaction" on the part of the requesting State "was blameworthy or otherwise" could be "an invidious task". And undoubtedly it creates practical problems. Generally it will be clear one way or the other whether the accused has deliberately fled the country and in any event, as was held in *Krzyzowski* [2007] EWHC 2754, given that flight will in all save the most exceptional circumstances operate as an almost automatic bar to reliance on delay, it will have to be proved beyond reasonable doubt (just as the issue whether a defendant has deliberately absented himself from trial in an inquiry under section 85(3) of the Act). But it will often be by no means clear whether the passage of time in requesting the accused's extradition has involved fault on the part of the requesting State and certainly the exploration of such a question may not only be invidious (involving an exploration of the State's resources, practices and so forth) but also expensive and time consuming. It is one thing to say, as Lord Edmund-Davies said in *Kakis* [1978] WLR and later Woolf LJ said in 1 779 *Ex p Osman* (No 4) [1992] All ER and Laws LJ in *La Torre v Republic of Italy* [2007] EWHC at [37], that in borderline cases, where the accused himself is not to blame, culpable delay by the requesting State can tip the balance; quite another to say that it can be relevant to and needs to be explored even in cases where the accused is to blame.
>
> 28. The Divisional Court's suggestion that there would be "an asymmetry" in a "concurrent fault" case in taking account of the accused's fault but leaving out of account the requesting State's fault seems to us, with respect, misconceived. In the ordinary way the accused gets the benefit of the passage of time (unless he has caused it) irrespective of any blameworthiness on the part of the requesting State. Why then, save perhaps in a rare borderline case, consider whether the requesting State itself should in addition be found at fault."

The Diplock/Brown Principles

34. From this ruling it becomes clear that the dilatoriness of the requesting State's judicial authority (the RJA) may not generally be criticised by the fugitive, interrogated as to detail or used as a ground to avoid extradition. The reasons for this were set out both by Lord Diplock and Lord Brown and include the lack of need to or practicality of examining the internal administrative processes or funding of the RJA. Furthermore, the cost involved in such an exercise would not be justified. Finally, for non-fugitives, the accused gets the benefit of the delay in borderline cases, where the accused himself is not to blame, where there is culpable delay by the requesting State and that can tip the balance. This decision supports the third Diplock principle but refines it. Thus, I will add principle four to the Diplock three in relation to S.14, as follows:

    (1) Delay caused by the accused or convicted fugitive fleeing his sentence cannot be relied upon by him under S.14 to show injustice or oppression.

Save in exceptional circumstances (for instance the RJA informing the fugitive that the prosecution has been dropped).

(2) The effects of delay caused solely by JAs can be relied upon by a non-fugitive requested person in relation to the effect upon him to show injustice or oppression.

(3) There is generally no justification or need for an investigation into the requesting State's JA's behaviour or conduct in causing the delay, unless a promise not to prosecute has been given or something similar.

(4) For non-fugitives, in borderline cases where the requested person himself is not to blame, if there has been culpable delay by the requesting State's JA the accused gets the benefit of the delay in showing injustice or oppression.

35. The interpretation of the word "culpable" will develop further below. I am fortified in these conclusions by the ruling of Cranston J in *Zengota v Poland* [2017] EWHC 191 (Admin). He set out a number of factors in relation to oppression under S.14:

> "32. Drawing the threads together, the law regarding the bar of oppression through passage of time is as follows:
>
> (1) Oppression is not easily satisfied, hardship is not enough.
>
> (2) The onus is on the requested person to satisfy the court that it would be oppressive to extradite him by reason of passage of time. The requested person must establish a causal link between the passage of time and its oppressive effects through the change in circumstances.
>
> (3) The gravity if the offence is relevant to whether the change in the circumstances of the requested person have occurred which would render his return to stand trial oppressive.
>
> (4) If the requested person is a fugitive he cannot take advantage of oppression save in the most exceptional circumstances.
>
> (5) The requesting authority must establish that the requested person is a fugitive to the criminal standard.
>
> (6) Delay brought about other than by the requested person is not generally relevant since the focus is the effects of events which would not have happened, for example a false sense of security
>
> (7) It is only in borderline cases where the accused is not himself to blame, that culpable delay by the requesting State may tip the balance against extradition."

The S.21 *EA03* balancing exercise and delay

36. For those requested persons who are convicted, S.21 of the Act provides:

"**21 Person unlawfully at large: human rights**

(1) If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.

(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

(3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued.

(4) If the judge makes an order under subsection (3) he must remand the person in custody or on bail to wait for his extradition to the category 1 territory.

(5) If the person is remanded in custody, the appropriate judge may later grant bail."

37. Art. 8 of the ECHR states:

"1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The balancing exercise

38. It is settled law that the consequences of extradition, the interference with Article 8 rights, must be 'exceptionally serious' before the public interest in the importance of extradition may be outweighed by the Appellant's private and family life so as to become disproportionate. Guidance was given in *Norris v Government of United States of America* [2010] UKSC 9, by Lord Phillips PSC thus:

"52 It is of critical importance in the prevention of disorder and crime that those reasonably suspected of crime are prosecuted and, if found guilty, duly sentenced. Extradition is part of the process for ensuring that this occurs, on a basis of international reciprocity. It is instructive to consider the approach of the Convention to dealing with criminals or suspected criminals in the domestic context. Article 5 includes in the exceptions to the right to liberty (i) the arrest of a suspect, (ii) his detention, where necessary, pending trial, and (iii) his detention while serving his sentence if convicted. Such detention will necessarily interfere drastically with family and private

> life. In theory a question of proportionality could arise under article 8(2). In practice it is only in the most exceptional circumstances that a defendant would consider even asserting his article 8 rights by way of challenge to remand in custody or imprisonment: see *R (P) v Secretary of State of the Home Department* [2001] WLR 2002, para 79, for discussion of such circumstances. Normally it is treated as axiomatic that the interference with article 8 rights consequent upon detention is proportionate.
> …
> 54 … The dislocation of family life that will frequently follow extradition will not necessarily be more significant, or even as significant, as the dislocation of family life of the defendant who is remanded in custody. It seems to me that, until recently, it has also been treated as axiomatic that the dislocation to family life that normally follows extradition as a matter of course is proportionate. This perhaps explains why we have been referred to no reported case, whether at Strasbourg or in this jurisdiction, where extradition has been refused because of the interference that it would cause to family life.
> …
> 56 The reality is that only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves. That, no doubt, is what the commission had in mind in *Launder* 25 EHRR CD 67, 73 when it stated that it was only in exceptional circumstances that extradition would be an unjustified or disproportionate interference with the right to respect for family life. I can see no reason why the district judge should not, when considering a challenge to extradition founded on article 8, explain his rejection of such a challenge, where appropriate, by remarking that there was nothing out of the ordinary or exceptional in the consequences that extradition would have for the family life of the person resisting extradition. "Exceptional circumstances" is a phrase that says little about the nature of the circumstances. Instead of saying that interference with article rights can only outweigh the importance of extradition in exceptional circumstances it is more accurate and more helpful, to say that the consequences of interference with article rights must be exceptionally serious before this can outweigh the importance of extradition. A judge should not be criticised if, as part of his process of reasoning, he considers how, if at all, the nature and extent of the impact of extradition on family life would differ from the normal consequences of extradition."

39. The general factors to be taken into consideration in the S.21 balancing exercise involving Art 8 rights were outlined by Lady Hale in *HH v. Genoa* [2012] UKSC 25. ('HH') (at paras. 6-9) who ruled thus:

"6. Agreeing with Lord Phillips, Lord Hope also stressed that "exceptionality is not a legal test" and that extradition was "not a special category which diminishes the need to examine carefully the way the process will interfere with the individual's right to respect for his family life" (para 89). The public interest in extradition is a "constant factor" and will always be a "powerful consideration to which great weight must be attached". Against this, "those aspects of the article 8 right which must necessarily be interfered with in every case where criminal proceedings will be brought will carry very little, if any, weight". "What is the extra compelling element that marks the given case out from the generality?" (para 91). The only feature of this case which was not inherent in every extradition case was the delay (para 93).

7. Lord Mance cautioned against formulations such as a "high threshold", "striking and unusual facts" or "exceptional circumstances". They could be read as suggesting that the public interest in extradition is the same in every case, when it is not, and also that the extraditee has some sort of legal onus to overcome the threshold, when in fact the competing public and private interests have to be weighed against each other (para 108). Further, such formulations "may tend to divert attention from consideration of the potential impact of extradition on the particular persons involved … towards a search for factors (particularly external factors) which can be regarded as out of the run of the mill". Some circumstances which might influence a court to find that the interference was unjustified could hardly be described as "exceptional" or "striking and unusual":

> "Take a case of an offence of relatively low seriousness where the effect of an extradition order would be to sever a genuine and subsisting relationship between parent and baby, or between one elderly spouse and another who was entirely dependent upon the care performed by the former" (para 109).

He too favoured balancing the "general public interest in extradition to face trial for a serious offence" against the "exceptional seriousness of the consequences which would have to flow from the anticipated interference with private and family life in the particular case" (para 114).

8. We can, therefore, draw the following conclusions from *Norris*:

(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.

(2) There is no test of exceptionality in either context.

(3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.

(4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.

(5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.

(6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.

(7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

So, the test is not exceptionality. The burden is on the requested person to prove exceptional seriousness in relation to the consequences of the extradition on his/her family life. As one of the factors in deciding whether extradition will be disproportionate, delay by an RJA may reduce the weight of the public interest in extradition factor and delay by any JA may increase the weight of the Art.8 rights to family life factor.

40. In *Celinski & Others* [2015] EWHC 1274 (Admin) Lord Thomas ruled that the Court must conduct a balancing exercise in order to determine whether the requested persons' rights under Article 8 are outweighed by the public interest in extradition:

> "9. … the public interest in ensuring that extradition arrangements are honoured is very high. So too is the public interest in discouraging persons seeing the UK as a State willing to accept fugitives from justice. We would expect a judge to address these factors expressly in the reasoned judgment."

He went on to rule that:

> "10. … the decisions of the judicial authority of a Member State making a request should be accorded a proper degree of mutual confidence and respect``

In relation to conviction appeals, the Lord Chief Justice stated at para. 13:

> "13. … The prevalence and significance of certain types of offending are matters for the requesting State to decide…… it will therefore rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let

> alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been".

At para.39 the Lord Chief Justice ruled that a proper balancing act needs to be carried out with detailed reasons to be provided:

> "39. … The important public interests in upholding extradition arrangements, and in preventing the UK being a safe haven for a fugitive as Celinski was found to be, would require very strong counter-balancing factors before extradition could be disproportionate."

Children's interests

41. In assessing proportionality there must be a careful fact-specific analysis of the potential effects of extradition on a relevant child: see *HH* per Baroness Hale at paras. 33- 34; Lord Hope at paras. 88-89; Lord Mance at paras. 98 and 101; Lord Judge CJ at para. 124; Lord Kerr at paras 144 and 146; Lord Wilson at para. 152. There are a number of errors to be avoided when conducting this analysis:
    (1) The weight to be afforded to the public interest will "vary according to the nature and seriousness of the crime": *HH* at para. 8(5);
    (2) The court must not simply dismiss the case by accepting that the child's interests will be harmed but that the public interest in extradition is almost always strong enough to outweigh it: *HH* at para. 34.
    (3) The seriousness of the crime is relevant, but is not the decisive factor. Lord Hope in *H and S v Lord Advocate* [2013] 1 AC 413 made clear that it would be an error to treat it as such (paras. 49 and 56).
    (4) The best interests of children must not be devalued by the actions of their parents for which they cannot be held responsible: (*HH* at paras. 20, 33 per Baroness Hale and para. 44 per Lord Hope).

First instance case law on delay under S.21

42. It is clear from *HH* that it is generally not the delay in itself which is a factor but instead the effects thereof due to the changes in or growing of family life of the requested person and thus his/her Art.8 rights.

43. Despite the clear guidance from the higher appellate Courts that these cases are intensely fact specific; despite the deference which is to be given by appellate Courts to the decisions of first instance Judges who have heard the evidence live and judged the witnesses for themselves and despite the warnings by the Lord Chief Justice in *Celinski* (at para. 14), counsel in this appeal provided 19 authorities and sought to argue by analogy from the facts of many of those cases. I shall consider those which assist in considering points of principle and briefly cover the fact specific cases which are allegedly comparables.

Comparables

44. I do not accept that there are generally any comparable cases for decisions under S.21 of the *EA03*. In personal injury quantum cases, comparables are essential to set the case specific award into the historic scale of awards. Each claimant is individual and each set of physical and psychiatric injuries is individual, but damages for pain, suffering and loss of amenity are set in ranges and so previous decisions give guidance for the limits of the scales. Comparables are helpful. In contrast, in extradition decisions under S.21, each set of offences are different, the sentences passed by the foreign JAs are different, the previous convictions are different, the individual timelines are different, the family and personal circumstances and characteristics are different and the effects of delays will be different. There are also some important constant factors: the special objectives of extradition set out in Crim PR r.50.2; the need to make plain that the UK is not a safe haven for fugitives and the public interest in upholding the rule of law in the UK and elsewhere. Thus, factual comparability does not really exist in extradition cases. However, as described by Chamberlain J in *Pabian* cited below, comparability of approach, tidal shift or re-interpretation of the principles can assist.

45. In *Juszczak v Poland* [2013] EWHC 526, Collins J allowed an appeal against an extradition order for a man facing a 2 year suspended sentence for 3 offences relating to theft, cars and threats of violence. He committed a further offence, so the suspension was triggered. He fled to the UK, married a woman with two children and they had a child of their own. One of the step-children had exceptional medical needs. The delay was around 2.5 years by the RJA and 4 years by the EJA. He was a fugitive and Collins J ruled that as a result he could not rely on S.14. In relation to S.21, having decided to allow the appeal, Collins J explained:

> "13. However, that decision was now some six and a half years ago. It was not until August 2007 that the domestic arrest warrant was issued and there was yet further delay until December 2008 when the EAW was finally issued. There has been no explanation for the delay between June 2006 and December 2008, and since it is not disputed, and has not been disputed that the appellant's evidence given in his witness statement (that he was in touch with the probation officer and so it was known that he was in this country, it is not a question of the authorities in Poland not being able to know where he had got to) on the face of it there is no excuse for the delay in failing to issue the warrant until December 2008, precisely two and a half years after the activation of the suspended sentence
>
> …
>
> 19. Perhaps this is a warning for both the Polish authorities and the Serious and Organised Crime Agency of the need to act speedily in seeking return of offenders, either to face prosecution or to serve sentences."

46. In *Tomaszcewicz v Poland* [2013] EWHC 3670, Collins J allowed an appeal against an order to extradite a man to serve an 18 month suspended sentence for car burglary and he also faced accusations of further offences. He fled to the UK in 1998 and it took 8 years

before the EAW was issued and 5 years before the NCA certificate was issued. He was married with a child. He was a fugitive for at least part of the delay period. S.14 was not the issue. S.21 was the issue.

47. In *Wolack v Poland* [2014] EWHC 2278, Collins J refused to overturn an extradition order relating to man who was convicted of two offences of theft when he was a teenager and sentenced to 1 year and 10 months in prison. He came to the UK as a fugitive, committed a driving offence here and failed to comply with Court conditions. He had a partner and a child. They were in financial trouble. The delay was around 6 years. Collins J commented that:

> "9. It is, in my judgment, quite wrong for this court to assume culpability in any delay unless it is so excessive or there are factors which indicate that it really was not reasonable for the authority to fail to issue a warrant earlier than it did. Furthermore, even when a warrant is issued, it may take time for it to be appreciated where the appellant precisely is in this jurisdiction. It is all very well to say it should not have been difficult to find him but one must also bear in mind that there are priorities that have to be adopted by the authorities here.
> 10. Having said that, and I note that those are matters which were raised by Foskett J in the case of *Jabczynski v Circuit Court In Olsztyn Ii Penal Department Poland* [2013] EWHC 1803 (Admin), a case in which he indicated, in my judgment correctly, that this court should not be too quick to decide that delay is to be regarded to culpable. If it is not culpable delay, then the weight to be attached to it in favour of saying that an extradition would be disproportionate will be slight."

I shall return to this concept of culpable delay below.

48. In *Oreszczynsi v Poland* [2014] EWHC 4346 (Admin), Blake J allowed an appeal from an extradition order relating to a man who had committed theft from and of motor vehicles in 2002. He had been living in the UK from 2007. He had a wife and children. It is not clear, from the judgment I was provided with, whether he was a fugitive. The hearing had been adjourned for further evidence from the NCA about the cause of the 4 years of delay in issuing the NCA certificate. There had also been delays of many years by the RJA in issuing the EAW back in 2010. Blake J found that a simple check with the Home Office would have disclosed the requested person was in the UK and none was done and that was "culpable delay". Blake J considered "culpable" delay in the context of S.21 and stated that:

> "8. I recognise that there is a difference between the passage of time and culpable delay by a public authority. Culpable delay can only arise when something ought to have been done quicker than it was and there is no good explanation for why it was not. It will not be easy to draw the inference of

> culpable delay from the mere passage of time for a number of reasons, many of which were identified in *Jabcysnk*i:
>
> i. where the appellant is a fugitive from a requesting State there is no purpose of issuing an EAW in a particular language unless there is some reason to believe that the fugitive is in the relevant country;
>
> ii. there are resource issues for any public authority dealing with a large number of applications and the court will be in no position to know what priority should be given to the particular case;
>
> iii. there is no duty on the requesting State or its agents to spend potentially fruitless time and effort in making inquiries as to the whereabouts of the fugitive if there is no good information available likely to inform."

I agree that these are important matters of practicality and principle. It is not the purpose of the UK extradition process to try to second guess why the RJA delayed issuing the warrant. It may be because they had no idea where the fugitive was. There may have been other administrative or practical reasons.

49. In *Judkowiak v Poland* [2015] EWHC 2524 (Admin), King J allowed an appeal from an extradition order concerning a man convicted of two offences of assault occasioning ABH and sentenced to 8 months in prison which was suspended and he was required to apologise but refused. He later wrote a letter of apology. It was not found that he knew he was in breach of the suspended sentence. He fled Poland to the UK, married and had two children. There were 4 years of delay by the RJA issuing the EAW and 3 years 9 months delay before NCA certification. There was no explanation for the delays. He was not a fugitive. The appeal was made concerning both S.s 14 and 21. The decision was made on grounds of disproportionality (see para. 22).

50. In *Miller v Polish JA* [2016] EWHC 2568 (Admin), Collins J allowed an appeal from an extradition order relating to a man who was convicted of supplying cannabis in 2000-2003, sentenced to 2 years in prison and had 1 year and 6 months to serve. He came to the UK in 2005 to avoid the sentence. He was a fugitive. It took 3-4 years to issue the EAW, then 3 years to certify it, and then 3 years to arrest him. So, the RJA delay was 3-4 years and the EJA delay was 6 years. Collins J was trenchant about "culpable" delay:

> "5. The fact that it has taken six years or more for the authority in this country to get round to serving the arrest warrant and putting in train the extradition is nothing short of disgraceful. That sort of delay is simply inexcusable and the result of it has been that this appellant has consolidated his life in this country. He has a partner and two young children, and in fact the partner has only just ceased maternity leave. He is the main breadwinner for his family and if he is extradited to serve 18 months or thereabouts he will be removed as the source of the provision for his family. His family life

> will have been strengthened and his children will obviously be distressed, I put it no higher, at the fact that they no longer have their father for a period to look after them."

It is not a surprise that the Appellant in the appeal before me relied on that paragraph. It looks like a strong endorsement of a duty placed on FJAs and EJAs swiftly to search for fugitives, find them and arrest them, at the peril of losing the right to extradite them if they do not.

51. In *Zimackis v Latvia* [2017] EWHC 315, Garnham J allowed an appeal against an order extraditing a man who was convicted of burglary of garages in Latvia in 2004. He was sentenced in 2004 and the EAW was issued that year, before conviction. He fled to the UK that year. Another EAW was issued in 2009 and 6 years later the NCA certified it. There was evidence that his whereabouts were not known for many years. There were two applications for fresh evidence, one from the NCA and another from the appellant about his family life. Garnham J refused most of the appellant's new evidence because it could have been called at the hearing. He admitted the NCA's evidence explaining the delay. The offences were 13 years old. The RJA had delayed by over 3 years and provided an "unsatisfactory explanation" and the EJA had delayed by 7 years and the explanation was that the UK did not enter SIRENE, the EU EAW system, and only thereafter did the UK understand that the appellant was connected with the UK. Garnham J considered the decisions of Collins J and Blake J, on culpable delay, summarised above and ruled as follows:

> "25. Based on those three decisions, it seems to me right to acknowledge that the court should be slow to criticise the NCA given the competing burdens that fall on that organisation. Nonetheless, it is evident that prior to the UK's accession to the SIRENE arrangements, the NCA's approach to responding to receipt of EAWs depended on their being notified, by one means or another, of the presence of the subject of the EAW in this country. In this case, an enquiry of the Home Office would have revealed that the appellant was living in Yorkshire. An enquiry of the Department for Work and Pensions would have had a similar effect.
> 26. It is not necessary for me to decide whether or not the NCA are culpable on the facts of this case, but it is material for me to observe and conclude, as I do, that it would have been possible for the British authorities to have discovered the appellant's presence in this country, had a simple enquiry been made of the department responsible for the presence of Latvian nationals at the time in the UK.
> 27. The potential significance of delay in both the issue of an EAW by the requesting State and a prompt response to the EAW by the requesting (sic) State was explained by Lady Hale in *HH v The Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25. In particular, delay is relevant to

> the proportionality balancing exercise that has to be carried out. On the one hand, delay by the requesting authority suggests that the requesting State did not regard the offence as of particular seriousness. On the other hand, the delay may serve to increase the personal or family connections between the subject of the EAW and the country where he has taken up residence." (I have added the word (sic)).

I respectfully agree, subject to what I suspect is a typo. As I shall explain below, in my judgment it is not the culpability for the delay which is relevant in the extradition hearing under S.21, it is the effect of the delay on the S.21 balancing exercise, unless some extraordinary reason was behind the delay: like a decision not to prosecute, discrimination, racial prejudice or intentional heel dragging.

52. In *Kortas v Poland* [2017] EWHC 1356 (Admin), Divisional Court, LJ Burnett and Blake J refused to overturn an extradition order for a man who was convicted of fraud and drunk driving and sentenced to 1 year in prison with a conditional suspension. He broke the condition and the sentence was triggered. He was imprisoned, released on compassionate grounds and fled, ending up in the UK in 2009. An EAW was issued in 2014 because the RJA had trouble finding him until 2012. It then took 2 years for the EJA to issue a certificate and 2 more years to arrest him. The Appellant relied inter alia on "unexplained delay" in the appeal against the S.21 decision. Burnett LJ ruled thus:

> "34. … The scheme of the Framework Decision and the 2003 Act do not require delay routinely to be explained. Mr Southey's submission is based upon a proposition set out in his skeleton argument that "the Administrative Court has been increasingly willing to take into account unreasonable delay in pursuing warrants, especially where no good explanation is offered for the delay". In his skeleton argument, Mr Southey cited a number of decisions said to support that proposition.
> 35. To the extent that it is thought that unreasonable delay in itself is sufficient for Article 8 purposes, such an approach would not be consistent with binding authority. Delay in itself may provide a basis for resisting extradition. The relevant statutory provision is section 14 of the 2003 Act. That provides: "…"
> The interpretation of that section, including the particular difficulty that a fugitive has in relying upon it, is well settled by cases of the highest authority, such as *Kakis v Government of the Republic of Cyprus [1978] 1 WLR 779* and *Gomes v Government of Trinidad and Tobago [2009] UKHL 21; [2009] 1 WLR 1038*.
> 36. Article 8 ECHR does not provide a freestanding mechanism to dilute or circumvent section 14. In *HH*, Lady Hale explained the bite that Article 8 may have in an extradition case. The context was a recognition, that "it is likely that the public interest in extradition will outweigh the Article 8 rights

> of the family unless the consequences of the interference are exceptionally severe": see paragraph 8(7). Earlier in the same paragraph, Lady Hale explained that delay may be relevant for two reasons when considering Article 8. First, delay in seeking extradition may reduce the weight to be attached to the public interest in surrendering a person for prosecution. No doubt something similar would weigh in the public interest balance considered by prosecuting authorities in this jurisdiction if they were dealing with an old, relatively minor offence. Delay may reduce the weight to be accorded to the public interest in surrendering a person to serve a sentence following conviction, even when he has deliberately absconded, but in practice that will be rare. Secondly, the passage of time may have an impact on the nature and extent of the private or family life developed by the requested person in this country. When delay impacts upon Article 8, it is most usually in this context. In extreme cases, which have not been unknown, a young man wanted for a relatively minor offence committed decades ago has settled down in the United Kingdom and established a family. In such circumstances, an Article 8 argument will warrant close attention in accordance with authority.
>
> 37. The very high practical hurdle Article 8 presents in an extradition case is apparent both from *HH i*n the Supreme Court and *Norris* which preceded it. The applicable principles were drawn together in *Celinski* between paragraphs 5 and 14. There will rarely be any need for reference to other authority on the point."

This is an important decision and one by which I am bound. It puts into the shade the line of authority which was developed by Collins J and Blake J, at first instance, about culpable delay by JAs. I take into account that Blake J sat with Burnett LJ in this Divisional Court case. Thus, we return closer to the four Diplock/Brown principles, but not all of those apply (there is no bar in S.21 to the consideration of the effects of delay caused by fugitivity) and the remaining ones are adapted for S.21. This judgment provides further rationale for the principle that delay does not have to be explained and should not be investigated. Generally, no explanation is required to be provided at the Westminster Magistrates Court by either the requesting State or the UK Government for the delays in issuing the EAW or the NCA certificate or the delays in arresting the fugitive. These are matters of public administration, public finance, allocation of scarce resources and political decision making and are not to be the subject of evidential investigation on the request of a fugitive, potential fugitive or mere absconder. I can envisage that this might be different if the accusation was one of discrimination against a country or intentional obstructiveness undermining the special objectives of the *EA03.*

53. In the same year Burnett LJ, returned to the same issue in *RT v Poland* [2017] EWHC 1978 (Admin), this time sitting with Ouseley J, and explained the effects of delay in the S.21 balancing exercise thus:

> "59. In paragraph 8 of her judgment in *HH* Lady Hale explained that delay may be relevant for two reasons when considering Article 8. First, delay in seeking extradition may reduce the weight to be attached to the public interest in surrendering a person for prosecution. We observe that something similar would weigh in the public interest balance considered by prosecuting authorities in this jurisdiction before prosecuting, if they were dealing with an old, relatively minor offence. Delay may also reduce the weight to be accorded to the public interest in surrendering a person to serve a sentence following conviction, even when he has deliberately absconded to avoid serving the sentence, but its impact will obviously be less than in an accusation case. Secondly, the passage of time may have an impact on the nature and extent of the private or family life developed by the requested person in this country. This appeal concerns the interests of a child born after the appellant became a fugitive."

Further, Burnett LJ incorporated and adapted some of the Diplock/Brown principles thus:

> "61. The Framework Decision does not contemplate that requesting judicial authorities will routinely explain the chronology of proceedings and, save perhaps in a pure delay case relying upon section 14 of the 2003 Act, it would not be appropriate to request information from them. They might provide some explanation once they were aware that an issue had arisen. Yet the chronology upon which the appellant relies is not unusual. An EAW will not be issued until the requesting judicial authority believes that the wanted person has left the country and is elsewhere in the European Union. Until there is clear information of his location here the NCA will not consider certification. To behave in any other way would result in the waste of resources in dealing with cases which may not have any practical worth. Evidence before us confirms that intelligence about the appellant's presence in the United Kingdom was received on 6 November 2013. The EAW was certified eight days later and sent to the relevant police force for execution. 62. It is a frequent submission that someone has been living in the United Kingdom openly, often having had contact with various official bodies here. But neither the foreign judicial authority nor the NCA can be expected to explore the byways and alleyways of British officialdom to discover whether someone is in this country. In this case, it is true that the local police took a long time to arrest the appellant, although as we have noted the

> evidence suggests they had tried earlier and the appellant was taking steps to avoid them.
> 63. In a conviction case for a serious offence involving a fugitive, neither this feature, nor the earlier delays, leads us to conclude that the public interest in extradition has appreciably diminished."

It appears to me that no further need for explanation for the application of a modified version of the Diplock/Brown principles to S.21 in the light of this judgment. The Framework Directive does not entitle fugitives, convicted criminals or accused persons, to interrogate requesting States about their efforts to find the requested person after he has fled. Furthermore, executing JAs may not investigate until some information is received which indicates that the fugitive is in the country and there may be other reasons for not issuing a certificate. There is no duty owed to the fugitives, imposed on the requesting JA or upon worldwide executing JAs, to carry out extensive investigations to find where every fugitive is, triggered as soon as a fugitive flees his home country. That would probably cost and waste countless millions.

54. This brings me to three more recent cases on delay. Haddon-Cave J considered the applicability of some of the adapted Diplock/Brown principles in S.21 cases in *Tarka v Poland* [2017] EWHC 3755 (Admin), and stated in relation proportionality that:

> "14. In my view, the key principle which emerges from the House of Lords' decisions in *Kakis* and *Gomes* is clear: it does not lie in the mouth of a fugitive to argue that the requesting State is to blame for delay, that somehow unexplained delay should weigh so heavily in the balance that extradition is disproportionate.
> 15. Further, in my view, the general principle stated in *Kakis* and *Gomes* is equally applicable in the context of Art.8, as indeed Cranston J stated in *Sibilski* (see above). There is no reason in principle why it should not apply with equal force since the considerations are the same."

55. In *Ristin v Romania* [2022] EWHC 3163 (Admin), Fordham J explained some parts of the application of the Diplock/Brown principles with elegance and insight thus:

> "34. I think the Article 8 context is important. In the context of section 14 arguments about whether it is unjust or oppressive to extradite the requested person by reason of the passage of time, the question whether the individual is a fugitive really operates as an on/off switch. Leaving aside exceptional circumstances, if the requested person is a fugitive, they will not be able to rely on section 14 at all (see *Wisniewski* §§39, 58, *Pillar-Neumann* §61, *De Zorzi* §46vii). The logic is straightforward. You cannot complain about injustice or oppression from the passage of time, based on circumstances which have occurred during that passage of time, if the passage of time can

be laid at your own door because you knowingly placed himself beyond the reach of the authorities of the requesting State. Because fugitivity operates as an on/off switch in the context of section 14, questions of sub-categorisation involving 'quasi-fugitives' and 'fugitives not in the classic sense' is unhelpful. An on/off switch needs a bright line. In the context of Article 8 ECHR, the analysis has chosen to adopt the same concept of fugitivity. But the Article 8 analysis – including of the passage of time – is a more contextual and nuanced balancing framework of considerations, applying a human rights protection standard. There is no on/off fugitivity switch. An Article 8 argument may succeed even though the requested persons is a fugitive. An Article 8 argument may fail even though the requested person is not a fugitive. Fugitivity will be relevant when considering passage of time, including circumstances which have arisen during that time. But the passage of time will remain a relevant consideration in the Article 8 balancing exercise even where the individual is a fugitive. In Article 8 terms, a finding of fugitivity can dilute the weight which can properly be given to private and family life considerations which have arisen as a function of the passage of time. A finding of fugitivity can also fortify the weight to public interest considerations in favour of extraditing the requested person. The "safe haven" consideration is at its strongest in the context of fugitives; but there can be a "safe haven" public interest consideration where the requested person is seeking a shield from facing their responsibilities. The facts and circumstances relating to the requested person having left the territory of the requesting State and having come to the UK may give rise to all sorts of relevant features which can appropriately be considered in the context of an Article 8 proportionality assessment. In the Article 8 context, one way of expressing this nuance and subtlety might be to countenance difference "senses" or "degrees" to which there has been conscious evasion of responsibility. That is a function of an intense focus on the facts. I also think, viewed in this way, that attractions can lie the approach to Article 8 discussed in *Wisniewski* at §42 (from the judgment of Irwin J in *Herman v Poland* [2015] EWHC 2812 (Admin) at §22), which "in the context of Article 8", accepted that "even if the requested person was not a fugitive, he was 'close to it because of his failure to comply'.

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

> Article 8 cases, the purity of the analysis calls for lateral thinking to guard against distortion."

56. I agree that, when considering the effects of delay under S.21 of the *EA03*, there is no on/off switch. There is a sliding and more nuanced scale. An effect of fugitivity is to water down the strength of the Art.8 factor. The effects of delay caused by a fugitive are not ignored, but given less weight. The effects of delay caused by the RJA, if such causation can be disentangled from the delay caused by the fugitive, may water down the public interest in extradition. The effects of delay by the EJA may enhance the weight of the family life factors put forwards by the requested person but the "exceptionally serious effect" test in *HH* still needs to be satisfied to the criminal standard by the requested person.

57. In *Cis v Poland* [2022] EWHC 980, Choudhury J neatly summarised the shift in approach to the effects of delay on the S.21 balancing exercise thus:

> "21. … Whilst the earlier authorities were not overridden by the later cases, it is clear that a somewhat stricter approach is being encouraged by the higher courts in relation to the issue of delay than may have been the case in some earlier decisions."

58. In *Pabian v Poland* [2024] EWHC 2431 (Admin), Chamberlain J confirmed again that these cases are intensely fact sensitive (para. 44); summarised the EU SIRENE system (paras. 47-48) and then came to the meat of the questions about (1) the evidence relating to the cause of JA delay and (2) the effects of delay on the S.21 balancing exercise:

> "49. It is important, however, to note that, in the Divisional Court's reasoning in *RT*, what the issuing State could not be expected to do was make enquiries "to discover whether someone is in this country". As the careful analysis of Choudhury J in *Cis* makes clear, the position may be different where the authorities of the issuing State know that the requested person is in this country, as in *Cieczka*. In such a case, there is a step which those authorities could be expected to take, namely, make a direct request to the authorities here. There may, of course, be an explanation why that step was not taken. If so, the authorities in the issuing State should be prepared to give it. If no satisfactory explanation is given, the UK court is likely to assume that there is none. This is a factor that can be relevant to the Article 8 balancing exercise.
> 50. Once the UK authorities have received a direct request, a question may arise as to the significance to be attached to any subsequent delay between the receipt of the request and the arrest of the requested person. The court is unlikely to be impressed with a complaint made by a requested person who has taken steps to evade arrest or hide his location in the UK, as had the appellant in *RT*. Furthermore, as was recognised in *Wolack* and

> *Zimackis*, the court must be realistic about the resource constraints operating on the NCA and on UK police forces. But a long delay can properly be weighed in the Article 8 balance in cases where it would have been easy to locate the requested person and the UK authorities have failed to take even the most minimal steps to do so. Where there has been a long delay between a direct request from the authorities of the issuing State and the execution of the warrant in the UK, the NCA should be prepared to give at least a brief explanation of any steps taken to execute the warrant. If no such explanation is given, the court may assume that there is none. This too is a factor which may be of relevance to the Article 8 balancing exercise.
>
> 51. Delay may be relevant to the Article 8 balance in one or both of two ways. As Lady Hale said in *HH*, inadequately explained delay on the part of the issuing State may cast light on the seriousness attached by that State to the offending in respect of which extradition is sought. Inadequately explained delay on the part of the executing State is unlikely to bear on that issue, but may still be relevant when assessing the weight to be given to any interference with private and/or family life to which extradition gives rise. This is likely to be of particular importance in cases where extradition would disrupt family relationships which have started or significantly developed during the period of delay, but it may also be relevant where the requested person has built up a private life in this country during that period. The weight to be given to the interference is attenuated, but not extinguished, by the fact that the requested person came to this country as a fugitive from justice."

59. This summary neatly provides a middle way on evidence about the cause of delay by JAs. The general rule is that a fugitive cannot complain about or rely upon delays which he has caused by fleeing justice, failing to give his new address in the new country and concealing himself, save in exceptional circumstances. He can though rely on the effects of the delay. But what if the delay was not really caused by the fugitive? When an RJA knows the fugitive has fled and knows where he has gone and his address in a particular State and yet does nothing for years, then at least some explanation for the delays in issuing an EAW would be helpful in the evidence provided to the trial Judge. Where, after the EAW is issued, information is provided to the EJA by the RJA (not just to the NHS or the Home Office by the fugitive) that the fugitive is in the country and that he has a known address, and where there is substantial delay either issuing the certificate or arresting the requested person, some explanation may assist the trial Court. But, in the absence of evidence provided by the RJAs or EJAs, the accused or convicted criminal has no right to seek disclosure or to interrogate the JAs. The District Judge may draw inferences. In any event, the effects of delay caused by JAs are as described by Lady Hale in *HH.* Delay by the RJA may water down the public interest and fortify the Art.8 factor. Delay by the EJA may fortify the Art.8 factor. Fugitivity will water down the weight of the fugitive's Art.8 evidence.

Conclusions on the law

60. I consider that it is clear from the higher authorities that the Diplock/Brown principles relating to delay in extradition cases under S.14, also apply with some adaptation to the balancing exercise under S.21 of the *EA03.* They can perhaps be summarised thus in relation to S.21:

    (1) The delay in being brought to justice caused by an accused or a convicted *fugitive* through fleeing his trial or punishment, evading arrest by the RJA and/or concealing his/her whereabouts, cannot be relied upon by him under S.21 as a factor in itself, however the effect of that delay on his family life and Art.8 rights can be taken into account, but it is given less weight because he was and is a fugitive.

    (2) Save in exceptional circumstances, a fugitive has no right to interrogate JAs about delay. In extradition hearings there is generally no justification or need for an investigation into the RJA's or the EJA's behaviour or conduct in causing delay, but if evidence is provided that will be taken into account.

    (3) Substantial delay by an RJA, which is unexplained and appears unexplainable purely on the grounds of the requested person fleeing, may also reduce the public interest in extradition.

    (4) The *effects* of delay caused by RJAs and EJAs can be relied upon by a fugitive or a non-fugitive in relation to his/her family life and Art.8 rights. In the case of a fugitive the weight of this factor is reduced.

The applications

61. I granted the Respondent's application to put in a witness statement from Mr Barton of the NCA. In my judgment, there was no need for it on the appeal, but it was offered and the Appellant did not object. If the executing JA wishes to put in evidence explaining delay, that is a matter for them at the trial, they are not required to do so by the Framework Directive or the *EA03* or the appellate case law. If they wish to do so it should not be put in on appeal because it is evidence which was available for the hearing below. For the Respondent JA's ability to put in fresh evidence on appeal I take into account the ruling of Hickinbottom LJ and Green J in the Divisional Court in *FK v Germany* [2017] EWHC 2160 (Admin), at paras. 39-40 and 43. If the Respondent seeks to put in fresh explanatory evidence, the S.27(4)(b) criteria do not apply and this Court has inherent jurisdiction to allow it if such is in the interests of justice. In this case all the Respondent's additional evidence showed was: (1) no prison assurance was provided by Romania when the Appellant had been arrested on another EAW in 2017, so he was then discharged by a District Judge. At that time, the Crown Prosecution Service recommended a reissue only if prison assurances could be provided by Romania. The EAW for these convictions was issued in 2018 but again no prison assurance was given. After conducting intelligence searches in an effort to locate the Appellant, it was determined that they were likely no longer in the UK. Therefore, as is standard procedure, the warrant reference 1275/118/2017

was not certified. Rightly or wrongly the NCA probably did not want to re-arrest and have the Appellant discharged due to the same defect. There was some confusion about whether the Appellant had left the country in 2018. I did not hear full argument and was not given the necessary statutes, regulations and guidance on how the NCA worked so I was unable to decide if a decision not to certify due to lack of prison assurances would be within policy. Nor was the appeal the correct forum for such an issue to be raised or determined. (2) The NCA had Brexit issues with lack of access to SIRENE from late 2020. (3) The NCA received a further request from Romania on 21.10.2021. There were some administrative oversights between 2021 and 2023.

62. As to the Appellant's application. The power to admit fresh evidence on appeal is set out in S.27 of the *EA03* and is subject to pre-conditions:

> "(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 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"

63. The law on this topic was explained in *Hungary v Fenyvesi* [2009] EWHC 231, at para 32. per Sir Anthony May:

> "32. In our judgment, evidence which was "not available at the extradition hearing" means evidence which either did not exist at the time of the extradition hearing, or which was not at the disposal of the party wishing to adduce it and which he could not with reasonable diligence have obtained. If it was at the party's disposal or could have been so obtained, it was available. It may on occasions be material to consider whether or when the party knew the case he had to meet. But a party taken by surprise is able to ask for an adjournment. In addition, the court needs to decide that, if the evidence had been adduced, the result would have been different resulting in the person's discharge. This is a strict test, consonant with the parliamentary intent and that of the Framework Decision, that extradition cases should be dealt with speedily and should not generally be held up by an attempt to introduce equivocal fresh evidence which was available to a diligent party at the extradition hearing. A party seeking to persuade the court that proposed evidence was not available should normally serve a witness statement explaining why it was not available. The appellants did not do this in the present appeal."

64. It is not generally permissible for the Appellant to adduce evidence which ought to have been adduced and was available at the original hearing. In addition, the test of decisiveness

is that set out at para. 35 of the judgment in *Fenyvesi.* The threshold is high and the Court must be satisfied that the evidence would have resulted in the judge deciding the relevant question differently. In other words the fresh evidence must be decisive. Updating evidence is different.

65. In so far as the fresh evidence from the Appellant went to updating events I allow it in. Those are, by definition events which had not occurred by the time of the hearing below. I deal with decisiveness below. This evidence covered the birth of the Appellant's new grandchild. In so far as the evidence covered all old matters, which were available to be called at the trial, I disallow the application. Nor do I consider that any of the old uncalled evidence would have been decisive.

Applying the law to the facts

66. The Appellant did not succeed on S.14 at the hearing and does not appeal that ruling. He was found to be a fugitive. I take into account that the passage of time in itself is not a balancing factor in favour for refusing extradition under S.21. It is the effect on the Appellant and his family of the delays caused, not so much by his fugitive activity but by all JA's delay which is relevant. Differentiating the cause of the delay in the case of a fugitive is often difficult and is best avoided. A general approach, which will involve a sliding weight scale, is to be preferred. Assessing the effect is not so difficult.

67. This Appellant was a fugitive. He fled Romania after pleading guilty and just after being released from prison for another crime. There was no delay by the RJA, the EAW was issued within 2 weeks of his appeal being determined. There was delay by the NCA, which is our executing EJA, in certification of the EAW, which was 5 years and 4 months in total. It is often difficult to disentangle the delay caused by the Appellant's fugitive behaviour from that caused by the EJA. There was no need in law for the Judge to enter into an examination of the reasons for the delay by the EJA. However, the evidence which I have been provided with on appeal shows: (1) a lack of any prison assurance for two of the EAWs leading to the CPS advising the NCA not to issue another certificate until prison assurance is provided; (2) third party delay due to Brexit; and (3) inadequate NCA administration thereafter. The delay between the certification and the arrest was short. As for the earlier delays in 2018-2020, the Judge found that the Appellant's fugitive status was the cause. The Appellant spent some time at the appeal hearing blaming the NCA for failing to find him after his first extradition case (for another offence) was discharged in early 2018. But that approach ignores his fugitive status. Certainly, he was found and arrested in 2017 for the other offence/s, then discharged due to inadequate prison assurances from Romania. He appears to have moved address within months of the first extradition hearing. He should have told the Romanian JA where he was. They could have told the executing JA (the NCA) and the EAW might have been certified and executed. Better, he should have travelled back to Romania to serve his sentence. It does not lie in his mouth to complain that neither the RJA or the EJA looked hard enough, he having fled Romania in breach of address change reporting conditions and he taking the view that the finding

him was "*their problem*". Before me, but not the Judge, there was some evidence about what happened in 2018 in the NCA. There may have been a decision not to issue another certificate without a prison assurance but that evidence was unclear. There may be a range of reasons why the NCA will not certify an EAW but that has not been fully explored in evidence and was not put before the trial Judge. Nor, in my judgment, did it have to be. The cause of all of the delay (fugitive or JA) was unclear and I suspect will often be difficult to disentangle, but it is less relevant in S.21 issues.

68. The Judge accepted the Appellant's evidence and that from his wife about their private lives in the UK. They had a son who was married and they had one grandchild at the time of the trial. I accept that they are now blessed with two grand-children. The inherent stress and loss caused by imprisonment on all convicted person's families is not a ground for refusing extradition. All imprisonment and all extradition inherently has the effect of interfering with private lives. In this case the Appellant's wife works and studies. His son is in work. The parents care for their children but the Appellant and his wife are helping to care for their grandchildren when they are not themselves working. The Judge was aware of the way in which the sole grand child (at the date of the hearing) would lose the benefit of the love and care by a grandparent whilst the Appellant is in prison, but did not consider that to be an exceptionally severe consequence.

69. The Judge rightly took into account that the Appellant came to the UK in 2017 and that he was married with an adult son. There had been little change in his circumstances through time other than the birth of his grandchild at the time of the hearing. The primary carers for the child were the parents, with secondary care from the Appellant and his wife. One half of that secondary care will be withdrawn by extradition. The effect on grandchildren with parents still present in the UK is likely to be less severe than that upon any children, aged under 16, of the requested person.

70. Against these factors the Judge weighed the special objectives in extradition cases, the weighty public interest in upholding the rule of law and mutual respect for other State's judicial process. The Judge took into account the need to ensure that convicted criminals do not regard the UK as a safe haven. The Judge considered the seriousness of the offences and the sentence passed, which was a matter for the RJA, not this Court. He recognised that the offences were not the most serious.

71. The curfew point was not raised at the hearing below and has little weight, it was overnight only with weekly reporting. The seriousness of the offence sub-ground of appeal did not advance the appeal further. The sentence was 2 years which is not a short time in anyone's life and is clearly serious enough.

72. The test is whether the Appellant and his family will suffer consequences from the interference with family life which will be exceptionally severe and hence disproportionate.

Overall, the Judge decided that it was not disproportionate to extradite the Appellant to serve his sentence (or part thereof) in Romania.

73. The Judge recited the test in this way at J92(6): "The delay since the alleged extradition offence may both diminish the weight to be attached to the public interest and increase the impact upon private and family life (H.(H.) at [8](6))." At J95 the judge was addressed by the Respondent on the test not being an on/off switch: "95. Additionally, Mr Davies referred me to *Kortas v Poland* [2017] EWHC 1356 (Admin) at [36] and *Ristin v Romania* [2022] EWHC 3163 (Admin) at [34]-[35]. He submitted that article 8 does not provide a freestanding mechanism to dilute or circumvent section 14; even though the assessment of delay in the context of article 8 is more nuanced and all encompassing, there are no 'bright lines' or 'on/off switches'; the fact that section 14 and article 8 share the same concept of fugitivity means there needs to be a degree of 'lateral thinking' between the two. Accordingly, he submitted, in light of the fact the RP is a fugitive, any passage of time can count for little in the Article 8 balancing exercise and no inquiry into the delay is appropriate." At J96 the Judge made a finding about the cause of the delay: "The passage of time since the offence results from the requested person's fugitivity." At J97 the Judge took into account all of the Appellant's Art.8 evidence of his family life as a factor expressly in his favour:

> "97. Factors against extradition are as follows:
> - The requested person has established a settled life for himself and his family in the UK over the last 7 years.
> - This includes stable accommodation and employment.
> - He has no convictions in the UK.
> - He has some health difficulties, albeit that he has elected not to be treated for them in the UK.
> - Extradition would have financial and emotional consequences for his wife, who is reliant on him and has difficulties of her own.
> - It would deprive his granddaughter of a loving grandparent at an early stage of her life.
> - The support offered by the requested person to his son and daughter-in-law would no longer be provided to them"

Reading these factors which were taken into account, in my judgment it is beyond doubt that the Judge took into account all the changes in the Appellant's family life during his time in the UK. That is what he was required to do. At J98 he expressly stated that different weight was attributed to the factors in the fact specific context.

74. Running through the adapted Diplock/Brown principles relating to S.21 decisions. (1) *The delay in being brought to justice caused by an accused or a convicted fugitive through fleeing his trial or punishment, evading arrest by the RJA and/or concealing his/her whereabouts, cannot be relied upon by him under S.21 as a factor in itself, however the effect of that delay on his family life and Art.8 rights can be taken into account, but it is*

given less weight because he was and is a fugitive. It is clear to me that the Judge approached the evidence applying this principle. He gave less weight to the Art.8 factors as a result of fugitivity, but he took them into account. (2) *Save in exceptional circumstances, a fugitive has no right to interrogate JAs about delay. In extradition hearings there is generally no justification or need for an investigation into the RJA's or the EJA's behaviour or conduct in causing delay, but if evidence is provided that will be taken into account.* The Judge did not carry out an interrogation of the EJA and was right not to do so. The NCA provided no explanation. They did not have to. (3) *Substantial delay by an RJA, which is unexplained and appears unexplainable purely on the grounds of the requested person fleeing, may also reduce the public interest in extradition.* There was no substantial RJA delay. (4) *The effects of delay caused by JAs can be relied upon by a fugitive or a non-fugitive in relation to his/her family life and Art.8 rights. In the case of a fugitive the weight of this factor is reduced.* The Judge appears to have applied this principle by carefully considering the Appellant's family life in the context of delay: (J92(6), J93, J95, J96, J97) and giving less weight to the factor due to the Appellant being a fugitive. I consider reading the judgment as a whole that the Judge did consider the whole of the Appellant's family life in the UK, the birth of his grandchild and the care he provided for the child.

75. In these fact sensitive cases concerning the balance under S.21 a range of results can be reached despite the same "length of delay". This is because the decision on proportionality depends on the many other factors. In this case it took 8 years to get to trial, conviction and sentence. That was not relevant at all and the Judge ignored it. The time from conviction to arrest, after he had fled Romania, was over 5 years. But that fact was not relevant to S.21. The *impact* of the time in the UK *was* relevant and the Judge took it into account.

76. One of the Appellant's neat points was that in the list of factors in his favour in the judgment the Judge did not put "delay". In law delay is not generally a factor in itself in the S21 balance, unless it is exceptional and culpable, so he did not have to list it. Furthermore, at paras. 51, 92, 93, 95, 96, 97 and 99 the Judge clearly considered the law relating to fugitivity and did not apply an "on/off" approach. Rightly, neither party submitted that he should have done. The Respondent expressly submitted that the "on/off" approach was not correct. The Judge took a titrated approach, focussing on the effects of the passage of time on the Appellant's Art.8 rights. It would have been difficult to disentangle the delay caused by the Appellant's fugitive activity from that caused by the EJA. In any event he focussed, through the lens of Art.8, on the effects on the Appellant's family life during the period since he arrived in the UK, including the period which the Appellant submits was caused by the EJA. I consider that he was right to do so. Applying the correct test on this appeal I do not consider that the Judge applied the wrong test or that Judge's decision was wrong. I do not consider that the Judge erred in such a way that he ought to have answered the relevant statutory question differently.

Conclusion

77. This appeal shall be dismissed.

END