Michaelmas Term

[2023] UKSC 39

On appeal from: [2021] EWHC 1584

JUDGMENT

Popoviciu (Respondent) *v* Curtea De Apel Bucharest (Romania) (Appellant)

before

Lord Hodge, Deputy President
Lord Lloyd-Jones
Lord Kitchin
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

8 November 2023

Heard on 16 and 17 May 2023

Appellant
Mark Summers KC
Rachel Kapila
(Instructed by CPS Appeals & Review Unit (Westminster))

Respondent
Edward Fitzgerald KC
Peter Caldwell
Graeme Hall
(Instructed by Boutique Law)

LORD LLOYD-JONES (with whom Lord Hodge, Lord Kitchin, Lord Hamblen and Lord Stephens agree):

Introduction

1. The Court of Appeal of Bucharest, First Criminal Section, Romania ("the appellant") sought the extradition of Mr Gabriel Popoviciu ("the respondent") pursuant to a European Arrest Warrant dated 3 August 2017.

2. An extradition hearing took place before District Judge Zani at the Westminster Magistrates' Court in October 2018 and was completed in April 2019. On 12 July 2019 District Judge Zani ordered the respondent's return to Romania.

3. The respondent appealed to the High Court against the order for his extradition. On 11 June 2021 the High Court (Holroyde LJ and Jay J) allowed the respondent's appeal pursuant to section 27(1)(a) of the Extradition Act 2003 ('the 2003 Act'), discharged the respondent pursuant to section 27(5)(a) and quashed the order for the respondent's extradition to Romania pursuant to section 27(5)(b): [2021] EWHC 1584 (Admin).

4. The High Court having certified a point of law of general public importance but having refused permission to appeal to the Supreme Court, on 27 May 2022 the Supreme Court granted permission to appeal. The hearing of the appeal took place on 16 and 17 May 2023.

5. Following the completion of the hearing of the appeal, on 13 July 2023 the Supreme Court was informed by the designated authority that the European Arrest Warrant dated 3 August 2017 had been withdrawn. In those circumstances, the Supreme Court made an order dated 24 July 2023 pursuant to section 43(4) dismissing the appeal. The Supreme Court has, nevertheless, decided to deliver its judgment on this appeal, in order to answer the certified question and to address other important issues which arise.

Proceedings in Romania

6. The respondent was accused in Romania of conspiring with Alecu Ioan Nicolae ('Alecu') to transfer a plot of land known as Baneasa Farm from state ownership to a private company, SC Log Trans SA, in which he had an interest. Baneasa Farm was occupied by the University of Agricultural Sciences and Veterinary Medicine, Bucharest. Alecu was the Rector of that university. It was alleged that the respondent

and Alecu had made false promises to the Senate of the University to obtain the transfer of the land in 2003-2004, with a view to building apartments on it.

7. In February 2005, a witness, Becali Gheorge ('Becali'), made complaints to the Public Prosecutor about the transfer, and requested the investigation of the respondent and Alecu. In June 2006, Becali made statements against the respondent and others. An investigation by the National Anticorruption Directorate ('DNA') began in October 2006 (File number 206/2006). The Public Prosecutor's Office attached to the High Court of Cassation and Justice ('HCCJ'), Romania's Supreme Court, also opened a file (File 1481/2006). In February 2008, an HCCJ prosecutor declined to initiate a prosecution against the respondent in File 1481/2006. In July 2008, however, the DNA prosecutors with conduct of File 206/2006, requested the Chief Prosecutor of the HCCJ to annul that decision. The HCCJ Chief Prosecutor did so, and then relinquished jurisdiction in favour of the DNA.

8. In November 2008, a police officer, Motoc Ion ('Motoc'), was authorised to take part in the DNA investigation of the respondent, File 206/2006. It is alleged that the respondent, with the assistance of others, bribed Motoc so that he would not properly perform his duty of investigating the respondent and Alecu. The respondent gave a statement to the DNA on 12 March 2009. Shortly thereafter, the DNA started criminal investigations of him in connection with his being an accomplice to an offence of abuse of office by Alecu, and of bribery of Motoc. He was arrested on 24 March 2009 and remanded in custody overnight before being granted bail by the Bucharest Court of Appeal. In June 2009, Becali declined to answer questions in relation to one aspect of the investigation of the respondent. On 21 December 2012, the DNA issued an indictment against the respondent and others, under case number 9577/2/2012.

9. The trial, in the Bucharest Court of Appeal, was heard by Judge Ion-Tudoran Corneliu-Bogdan ('Judge Tudoran'). There were 11 accused. One of the issues was whether the University was entitled to transfer Baneasa Farm, or whether it was the property of the State. The trial began in January 2013. The respondent was represented throughout, and was present at all or most of the hearings.

10. At a hearing in October 2014, Becali refused to testify. In answer to questions by the prosecutor, he confirmed that he had signed his earlier statement, but said he no longer made any declaration against any person. On 15 February 2016, Becali provided a further statement, in which he said that he no longer maintained his complaint and did not remember what he had said in his initial statement. He had thought that the respondent and Alecu were in cahoots, but he did not have any evidence of that. Three days later, the DNA commenced a prosecution of Becali for perjury in respect of his retraction of his original statement. In March 2016 Becali withdrew that retraction, saying that he now remembered 'how things really stood back then', and confirmed his original statement of June 2006. Later, in March 2016, Becali gave oral evidence at the

respondent's trial. In April 2016, the DNA discontinued the prosecution against him for perjury.

11. After receipt of written submissions, Judge Tudoran delivered his written judgment on 23 June 2016. Translated into English, it is 436 pages long. A substantial proportion of the first 300 pages comprises a recital of the prosecution case, followed by details of the many documents which had been referred to and considered. Judge Tudoran then reminded himself that under the Romanian Constitution, a person is considered innocent "until the criminal decision for his/her conviction remains final". He set out his findings, including that the contract between the University and SC Log Trans SA was illegal and that the respondent had been motivated by the pursuit of considerable profits. He concluded that "[t]he defendants did not prove in any way their claims, and the guilt which results from the assembly of the probatory material administered in the cause is certain and unequivocal". He found all the accused guilty of the offences with which they were charged.

12. In his judgment Judge Tudoran set out, briefly, his conclusions about the individual defendants. He found the respondent to have knowingly and intentionally broken the law and to have been the person who initiated the crimes.

13. The respondent was sentenced to a total term of 9 years' imprisonment.

14. Related civil proceedings, under File no 4445/2016 were also before the court. Judge Tudoran decided, however, that those proceedings should be dealt with separately, as the time taken to resolve them would otherwise lead to 'the surpassing of the term for the criminal action'.

15. The respondent appealed to the HCCJ. On 2 August 2017, a panel of judges (Judges Dascalu, Pistol and Arghir) delivered a written judgment (389 pages in English translation). They dismissed the appeal against conviction, but allowed the appeal against sentence to the extent of reducing the total sentence to 7 years' imprisonment. Amongst other findings, the HCCJ held that Judge Tudoran's decision was adequately reasoned and that his severance of the civil proceedings was both lawful and appropriate.

The European Arrest Warrant and the extradition hearing

16. On 2 August 2017 a domestic warrant of arrest was issued against the respondent in Romania in order to enforce his (now final) sentence. On the following day, a European Arrest Warrant was issued by Judge Andras of the Bucharest Court of Appeal. It was subsequently certified in the United Kingdom by the National Crime Agency.

The respondent was arrested in the United Kingdom under Part 1 of the 2003 Act on 14 August 2017.

17. While the extradition proceedings were current, the respondent made the following unsuccessful applications in Romania.

(1) He applied to re-open the HCCJ decision of 2 August 2017, on the basis of suggested bias on the part of Judge Arghir. His application was dismissed by the HCCJ (Judges Macavei, Cobzariu and Ilie) on 17 November 2017, for reasons given on 26 January 2018.

(2) On 8 June 2018 the same constitution of the HCCJ also refused an application by the respondent to annul his conviction. Reasons for the decision were given on 23 October 2018.

18. The evidential phase of the extradition hearing began before District Judge Zani at the Westminster Magistrates' Court in October 2018 and was completed in April 2019. District Judge Zani heard oral evidence from a number of witnesses. The respondent was not one of them.

19. District Judge Zani addressed and rejected a number of submissions made on behalf of the respondent, many of which did not relate to Judge Tudoran.

20. The respondent made the following submissions concerning Judge Tudoran:

(1) The respondent criticised Judge Tudoran's substantive judgment. Some of these criticisms repeated submissions which had been rejected by the HCCJ; others had not been raised before the HCCJ. They included submissions that Judge Tudoran's ruling involved a reversal of the burden of proof; that expert evidence had been wrongly excluded; that the ruling lacked reasons and that it failed to address the reliability of the prosecution case. It made criticisms of the Judge's findings on the issue of mens rea. District Judge Zani ruled that it was not for him to express a view as to the rights or wrongs of decisions taken by Judge Tudoran at trial and later considered by the HCCJ.

(2) The respondent submitted that Judge Tudoran lacked independence. His case before the Magistrates' Court was that the SRI (the Romanian domestic intelligence agency) may well have had some incriminating evidence about Judge Tudoran's son, and the District Judge was invited to infer that an active criminal investigation against the son would proceed if Judge Tudoran did not

provide the convictions which the SRI required. District Judge Zani found that submission to be speculative and unsupported by evidence. He had been told that an investigation had been carried out against Judge Tudoran's son, at the end of which no action had been taken. Moreover, one of the respondent's witnesses had put forward an entirely different suggestion as to why Judge Tudoran was under pressure in relation to his son. No application for Judge Tudoran to recuse himself had been made at any stage of the trial in Romania. The evidence given by witnesses for the respondent who had alleged improper influence on the Romanian judiciary had not been convincing.

21. The respondent also mounted a challenge pursuant to articles 5 and 6 ECHR concerning the independence of the Romanian judiciary generally, and that of the HCCJ judges who had upheld his conviction in particular. DJ Zani found little merit in these criticisms.

22. On 12 July 2019, DJ Zani ordered the respondent's return to Romania to serve his sentence.

The appeal to the High Court

23. The respondent appealed to the High Court against the order for his extradition. He repeated the submissions he had made and relied upon the evidence he had led before the Magistrates' Court. All those submissions were considered and rejected by the High Court.

24. Beginning in September 2019, however, the respondent applied to adduce fresh evidence concerning Judge Tudoran and to make fresh arguments regarding his lack of independence.

25. On 6 June 2019, Judge Tudoran had requested judicial retirement with effect from 15 October 2019. In July 2019, the Superior Council of Magistracy recommended to the President of Romania that the request should be granted. From about August 2019, articles appeared in the Romanian press making references to Judge Tudoran's unexplained wealth and allegations concerning his son's activities. On 22 August 2019, Judge Tudoran asked to resign, a step which would result in his forfeiting certain pension rights to which he would have been entitled if his retirement had taken place as planned in October that year. His resignation was accepted by the President on 19 September 2019.

26. During the course of the appeal proceedings, the respondent applied to admit, inter alia, evidence of and from the following criminal investigations and matters concerning Judge Tudoran:

(1) In May 2019, the Section for the Investigation of Crimes in Justice ('SIIJ') began an investigation in rem into allegations of abuse of office and selling influence made against Judge Tudoran by one Cezar Panait. This investigation proceeded under file number 1603/2019.

(2) On 19 September 2019, Prosecutor Moraru, on behalf of the SIIJ, began a criminal investigation in personam against Judge Tudoran under file 1603/2019, for offences of making false declarations, carrying out commercial activities incompatible with his judicial function and selling influence in connection with Panait's case. In October 2019, Prosecutor Moraru wished to interview Judge Tudoran, but was unable to do so because Judge Tudoran was in a psychiatric hospital.

(3) In February 2020, Dr Opris Liviu Ciprian ('Opris'), a physician, made allegations against Judge Tudoran concerning participation in illegally organised gambling, and unauthorised commercial activities as a judge, which became the subject of an investigation by the SIIJ under file number 477/2020.

27. On 17 September 2020, the respondent served a document from Catalin Dumitrescu ('Dumitrescu') dated 31 July 2020 from file number 1603/2019, concerning a suggested improper relationship between Judge Tudoran and Becali.

28. On 13 November 2020, the respondent served witness statements from Dumitrescu dated 10 October 2020, and Ionut Dojana ('Dojana') dated 9 October 2020.

29. On 23 November 2020 the CPS requested the appellant Romanian authorities to respond to the claim that Judge Tudoran had undisclosed personal or business links with Becali.

30. On 2 February 2021, the appellant served evidence from the DNA stating, inter alia, that:

> "Neither the case prosecutor nor the hearing prosecutor was aware (at the time of the investigation of the case, criminal

> investigation/trial) of the existence of a friendly relationship between Judge Bogdan Tudoran and another person involved in the trial. Also, the [DNA] did not have information about a possible hiding, by the judge, of such a relationship. Even if it proves the existence of a friendly relationship between the mentioned persons at this procedural moment, such aspect would not constitute a reason to review a final decision, according to the Romanian legislation in force."

31. On 9 February 2021, the respondent served a further witness statement from Dojana dated 8 February 2021 concerning an alleged bribe between Becali and Judge Tudoran, and also dealing with alleged improper commercial assistance and meetings taking place between Judge Tudoran and Becali.

32. On 12 March 2021, the full text of the criminal complaint made by Opris against Judge Tudoran in file number 477/2020 was served on behalf of the respondent.

33. The appeal hearing before the High Court (Holroyde LJ and Jay J) took place over five days between 15 and 19 March 2021. The High Court admitted the evidence of Dojana, Dumitrescu and Opris only. Dojana gave evidence in person. The evidence of Dumitrescu and Opris was considered in writing.

34. The written evidence of Dojana is summarised by the High Court at paras 64-67 of its judgment. Dojana said he had known Judge Tudoran through their mutual association with a man named Florian Pirvu ('Pirvu'). In his two written statements Dojana claimed that Judge Tudoran knew Becali before 2000. He had witnessed meetings involving Judge Tudoran, Becali and Pirvu. They had taken part in several unauthorised gambling sessions organised by Pirvu. At one meeting Judge Tudoran told Dojana that he had personally assisted Becali to acquire the FC Steaua Bucharest football club by devising a legal strategy and drawing up legal documents. Dojana said he was told by Judge Tudoran's son that there was later an issue as to whether the sale of the club had included certain rights, and that Judge Tudoran offered to help Becali win the court case in return for a large payment. He said he was told by the Pirvu brothers that Judge Tudoran had on another occasion helped Becali to obtain a favourable judgment in a criminal case, and had received a payment for doing so. In his second statement Dojana claimed that the prosecutor in file 1603/2019 (Panait's criminal complaint) was investigating the relationship between Judge Tudoran, Becali and Pirvu, which had been confirmed by witnesses in file 1603/2019 including Dobrin and Dumitrescu. He said he had also been told by Opris, a close friend of Judge Tudoran, that Judge Tudoran had blackmailed Pirvu and had committed other acts of corruption.

35. Dojana gave oral evidence to the High Court and was cross-examined. His oral evidence is summarised at paras 68 to 75 of the High Court judgment.

(1) Dojana said the friendship between Becali and Judge Tudoran was essentially a business relationship. He produced for the first time copy documents relating to companies owned by Pirvu which he said he had drawn up with Judge Tudoran's help in September 1996, and which had been approved and signed by Judge Tudoran in his then capacity as a judge at the Commercial Tribunal. He gave further examples of occasions when he said he had been advised by Judge Tudoran as to how to conduct legal proceedings, including some cases which Judge Tudoran himself would hear.

(2) In his evidence Dojana said he had been told by Judge Tudoran's son that the amount sought by Judge Tudoran for his proposed assistance in relation to the football club rights was either 2m EUR or 2m US$. Becali had not been willing to pay such a large sum. He said that in relation to the other matter, he had been told by Opris that Judge Tudoran had been paid €200,000 to secure Becali's release on bail in criminal proceedings. Pirvu had acted as surety. When Judge Tudoran did not initially receive the payment, he wanted Opris to start court proceedings against Pirvu so that Pirvu would be in need of Judge Tudoran's assistance for himself.

(3) Dojana stated that he had acted as Panait's lawyer when Panait denounced Judge Tudoran, making allegations of conduct wholly incompatible with Judge Tudoran's judicial office.

(4) Dojana claimed that on 22 August 2019 he was at the offices of the SIIJ speaking to Prosecutor Moraru in relation to Panait's complaint, file 1603/2019. At that time, Prosecutor Moraru had been trying for about a year to speak to Judge Tudoran about file 1603/2019 but had been unable to do so because Judge Tudoran was in a psychiatric hospital. Dojana said that Judge Tudoran came to the offices that day but did not speak to Prosecutor Moraru. He suggested that Judge Tudoran had spoken to Prosecutor Marin, though he had not seen that happen.

(5) Dojana said he was present when Dobrin and Dumitrescu made statements to Prosecutor Moraru. He said that they, and other witnesses in file 1603/2019, were in fear of Judge Tudoran.

(6) In cross examination Dojana stated that in 2021 he had learned for the first time that in 2013 Judge Tudoran's son had made a criminal complaint against Dojana and Panait for tax evasion. There had been no basis for the allegation.

36. The High Court summarised the written evidence of Dumitrescu as follows:

> "…77. Dumitrescu, Pirvu's nephew, had a close relationship with Judge Tudoran. He stated that Judge Tudoran, Pirvu and Becali had been very good friends since at latest 2002, and had met regularly, dined and gambled together. He stated that at the gambling sessions, in which huge sums were staked, Judge Tudoran's presence intimidated others and prevented them from trying to cheat Pirvu."

37. The High Court summarised the complaint of Opris in file 477/2020 as follows:

> "…80. In addition, Opris made a statement to the SIIJ in February 2020 in connection with file 477/2020 (his own criminal complaint against Judge Tudoran). Opris became an associate of Pirvu in 1996, and met Judge Tudoran who was providing legal advice to Pirvu's companies and 'protection within the judicial bodies'. He alleged that Judge Tudoran and Pirvu had 'an indissoluble bond' because the former had assisted the latter in relation to the investigation into the death of Pirvu's girlfriend. Opris gave a dramatic account of the circumstances. He alleged that from then on, Judge Tudoran frequently blackmailed Pirvu by reminding him that he would have faced a prison sentence if not for him.
>
> 81. Opris stated that a large part of Pirvu's fortune came from gambling, mainly with Becali. He asserted that Pirvu and Bucur Costel secretly agreed to cheat Becali of €4 million and share the proceeds. Pirvu did not pay Bucur his share, but Bucur was unable to complain because Judge Tudoran was supporting him in various legal issues. Pirvu also had interests in real estate, and Opris alleged that Judge Tudoran assisted by drafting legal documents, and by influencing judges of the Bucharest Court of Appeal, so that Pirvu could succeed in a dispute over a plot of land. In return, Opris stated, Judge Tudoran received a parcel of the disputed land, which he fictitiously transferred to Cornel Pirvu so that his role would not become known. He alleged that Becali was also involved in this matter.
>
> 82. Opris further alleged that Judge Tudoran had bragged to him about his power and influence and said that he had helped

> Becali to win an appeal against an order for pre-trial detention in criminal proceedings, in return for a payment of €200,000 which Pirvu guaranteed."

38. Other evidence sought to be adduced by the respondent, from Mihai Ciorcan (an investigative journalist), Liviu Dobrin and Constantin Ungureanu, was not admitted.

The judgment of the High Court

39. Holroyde LJ, with whose judgment Jay J concurred, addressed (at para 154) the question of the standard of proof in a case where it is submitted that the party whose extradition is sought has already suffered a flagrant denial of justice, because his conviction was the result of a wholly unfair trial, and that any substantial period of imprisonment based upon that conviction would be a flagrant breach of his article 5 rights. Having referred to *Minister for Justice and Equality v Rostas* [2014] IEHC 391 he concluded that it was not necessary in such circumstances for the requested person to prove on the balance of probabilities that his trial had in fact involved such flagrant unfairness as to deprive him of the essence of his article 6 rights. The correct test in such circumstances was whether there were substantial grounds for believing that there was a real risk that the requested person's trial had been flagrantly unfair. He explained that although it is the fairness of the past trial process which has to be considered, it is the real risk of the future consequence of imprisonment constituting a flagrant violation of article 5 rights which may be a bar to extradition. While the fact that the trial had already taken place may in practice make it harder for a requested person to establish substantial grounds for believing that a real risk exists, he considered that it would be wrong in principle to place a requested person who claimed he had in fact suffered a flagrantly unfair trial (and consequently would suffer arbitrary imprisonment if returned) at a disadvantage compared with one who feared that he would suffer a flagrantly unfair trial in the future.

40. Following the conclusion of the appeal hearing in the present case, on 28 April 2021 Chamberlain J gave judgment in *Kaderli v Chief Public Prosecutor's Office of Gebeze, Turkey* [2021] EWHC 1096 (Admin) and reached a different conclusion on the issue of the standard of proof. Having had *Kaderli* drawn to its attention following circulation of its Judgment in draft, the High Court stated that the reasons given by Chamberlain J reflected points which it had considered in reaching the decision in the present case and it respectfully disagreed with Chamberlain J's conclusion.

41. Holroyde LJ recorded (at paras 116, 117, 160, 161) his reservations about the evidence relied upon by the respondent. He stated that he had hesitated for a long time

over whether he could accept any of this evidence. Nevertheless, he had come to the following conclusions:

> "162. I have nonetheless come to the conclusion that Dojana, Dumitrescu and Opris provide credible evidence of at least the following allegations against Judge Tudoran: he had a long-standing relationship with Pirvu, in the course of which he had improperly and corruptly assisted Pirvu in legal matters; he also had a relationship over a number of years with Pirvu's friend Becali, in the course of which he had again provided improper and corrupt assistance with legal matters; he had participated in illegal gambling sessions with both those men; and he had received one bribe and solicited another. I cannot conclude on the balance of probabilities that these allegations are true; but in all the circumstances of this very unusual case, I accept that they may well be. In written submissions, the [respondent] had emphasised the evidence of Dojana as to his witnessing a meeting between Judge Tudoran and Becali whilst the [respondent's] trial was taking place. That particular point has been taken away from the [respondent] by Dojana's change of evidence as to the date of this alleged meeting; but the more general point remains, that there is said to have been at least recent contact between the complainant and the trial judge, which was never disclosed to the [respondent].
>
> 163. The [appellant] has plainly failed to put forward any evidence or information which dispels these concerns. There is no basis on which I could reject the response of the [appellant] to a formal request for information about the relationship between Judge Tudoran and Becali; but I agree with Mr Fitzgerald that it was very unsatisfactory. I would have expected the [appellant], in addition to denying any knowledge of such a relationship at the time of the trial, to investigate whether such a relationship did in fact exist. I also agree with Mr Fitzgerald that it is a surprising aspect of the Romanian criminal justice system if the late discovery of an undisclosed friendly relationship between a trial judge and an important prosecution witness 'would not constitute a reason to review a final decision'.
>
> 164. It is important to note that it is a particular, and unusual, feature of this case that the evidence does not show merely a relationship of friendship between judge and witness. It provides substantial grounds for believing that the relationship

was also one which involved improper, corrupt and criminal conduct by a serving judge. The evidence shows a real risk that the [respondent] suffered an extreme example of a lack of judicial impartiality, such that there can be no question as to consequences for the fairness of the trial. If there was such a relationship, Judge Tudoran clearly should not have presided over a trial in which Becali was the complainant and an important prosecution witness; but he did not recuse himself, and there was no disclosure to the parties even of the fact that the two men knew one another.

165. Moreover, whether the appeal hearing before the HCCJ is properly characterised as one confined to points of law, or as one which considered issues both of law and of fact, it was conducted in ignorance of the evidence now available about Judge Tudoran's relationship with Becali. The HCCJ was not asked to review the case on the basis that the trial judge had for many years had a close and corrupt relationship with a key prosecution witness. Thus its conclusion that the evidence of the [respondent's] guilt was clear failed to take into account important matters affecting the reliability of the prosecution evidence and the impartiality of Judge Tudoran's assessment of that evidence.

166. I would add that I accept the [respondent's] submissions as to why the fresh evidence has only been put forward at a very late stage.

167. In those circumstances, and for those fact-specific reasons, I accept that the oral evidence of Dojana, and the written statements of Dumitrescu and Opris, satisfy the *Fenyvesi* criteria and should be admitted as fresh evidence. On the basis of that fresh evidence, I am satisfied that there are now substantial grounds for believing that there is a real risk that the [respondent] was convicted by a judge who could not be impartial because of his undisclosed relationship with a key prosecution witness, and who therefore should not have tried the case, and that the [respondent] thereby suffered a complete denial of his art 6 rights at trial. There are therefore substantial grounds for believing that he faces, if returned to Romania, a real risk that he will suffer a complete denial of his art 5 rights, because his imprisonment will be arbitrary. The conditions in section 27(4) of the Act are accordingly satisfied."

42. Accordingly, on 11 June 2021, the High Court allowed the respondent's appeal (pursuant to section 27(1)(a) of the 2003 Act), discharged the respondent pursuant to section 27(5)(a) and quashed the order for the respondent's extradition to Romania pursuant to section 27(5)(b).

43. On 2 July 2021 the High Court certified that the following point of law of general public importance was involved in its decision, pursuant to section 32(4)(a) of the 2003 Act:

> "…In a conviction extradition case, is it sufficient for the requested person to show substantial grounds for believing that there is a real risk that his trial was so flagrantly unfair as to deprive him of the essence of his article 6 rights, and therefore a real risk that his imprisonment in the requesting state will violate his article 5 rights?..."

44. On the same date, the High Court refused permission to appeal to the Supreme Court.

45. On 27 May 2022 the Supreme Court (Lord Reed, Lord Leggatt and Lord Stephens) granted permission to appeal to the Supreme Court.

46. The appeal was heard on 16 and 17 May 2023.

Developments following the hearing of the appeal

47. On 26 May 2023 the Bucharest Court of Appeal suspended the execution of the respondent's conviction and sentence. On 20 June 2023 an appeal against that order brought by the Romanian prosecution, the DNA, was heard and dismissed by the HCCJ.

48. On 13 July 2023 the Supreme Court was informed by the designated authority that the European Arrest Warrant dated 3 August 2017 had been withdrawn. In those circumstances, the Supreme Court made an order dated 24 July 2023 pursuant to section 43(4) of the 2003 Act dismissing the appeal. The Supreme Court has, nevertheless, decided to deliver its judgment on this appeal, to answer the certified question and to address the other associated issues arising on this appeal.

The Soering principle

49. The scope of the European Convention on Human Rights (ECHR) was initially conceived as intra-territorial. Article 1, by which Contracting States undertook to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1", was taken as setting a territorial limit on the reach of the Convention. The jurisprudence of the Strasbourg court has, however, developed a number of important exceptions to this principle as a result of which the Convention is, in certain circumstances, given extra-territorial effect. (See for example *Al-Skeini v United Kingdom* (Application No. 55721/07) (2011) 53 EHRR 18.) In addition, the Strasbourg court has established and developed the *Soering* principle. In *Soering v United Kingdom* (1989) 11 EHRR 439 the Strasbourg court held that the extradition of the applicant to the United States of America to face trial on a charge of capital murder in Virginia, where, if convicted, he would be exposed to the "death row phenomenon", would give rise to a violation by the United Kingdom of article 3 ECHR. In this way the responsibility of a Contracting State could be engaged as a result of its surrendering an individual to another State where he would face a real risk of suffering treatment contrary to article 3. The court explained (at para 85) that in so far as a measure of extradition had consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee. The court concluded (at para 91):

> "In sum, the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requestion country."

The *Soering* principle does not strictly give the Convention extra-territorial effect. As the Strasbourg court explained (at para 91), such liability is incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment. Nevertheless, it is an important extension of the operation of the Convention scheme because it requires account to be taken of the risk of future treatment abroad which is prohibited by the Convention.

50. In *Soering* it was argued, in the alternative, on behalf of the applicant that the absence of legal aid in Virginia meant that he would not be able to secure his legal representation as required by article 6(3)(c) ECHR. The court observed (at para 113) that the right to a fair trial in criminal proceedings, as embodied in article 6, holds a prominent place in a democratic society and continued:

> "The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country."

The court concluded that the facts of the case did not disclose such a risk. Nevertheless, this sentence is the origin of a principle which has become accepted in the Strasbourg jurisprudence, whereby an extraditing State may bear responsibility indirectly for certain breaches of articles 5 and 6 ECHR.

51. Two matters call for comment at this point. First, the Strasbourg court is not addressing *any* procedural unfairness contrary to Convention standards; rather, it contemplates that a flagrant denial of the standards of a fair trial might give rise to the responsibility of the extraditing Contracting State. In *Othman v United Kingdom* (2012) 55 EHRR 1 the Strasbourg court considered it noteworthy that, in the 22 years since the *Soering* judgment, the court had never found that an expulsion would be in violation of article 6, a matter which served to underline its view that "flagrant denial of justice" is a stringent test of unfairness.

> "A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of art 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by art 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article." (para 260)
>
> (See also *Ahorugeze v Sweden* (2012) 55 EHRR 2 at paras 115, 116.)

52. Secondly, unlike the passage at para 91 of its judgment, cited above, where the court summarises the operation of the principle in relation to article 3 solely by reference to the risk of certain events occurring in the future, in addressing article 6 the court referred to both what the fugitive has suffered and what he risks suffering in the future. This is a matter of some importance in the context of extradition because it reflects the fact that the return of a fugitive may be requested following his conviction at trial in the requesting State ("a conviction case") or in order that he may stand trial in the requesting State ("an accusation case").

53. The present case is a conviction case. The return of the respondent to Romania was sought following his conviction at his trial in Romania. The respondent maintains

that his trial was flagrantly unfair. The Divisional Court concluded that there were "substantial grounds for believing that there was a real risk that the requested person's trial had been flagrantly unfair" (para 154). However, while accepting that the respondent's allegations may well be true, it could not conclude on the balance of probabilities that they were true (para 162). On this basis, the Divisional Court nevertheless discharged the respondent. On behalf of the appellant authority, Mr Mark Summers KC challenges this decision on the basis that it confuses proof of the occurrence of a past event, which must be proved to the civil standard of balance of probabilities, and the risk of the occurrence of a future event. This is the core issue on this appeal.

Proof and assessment of risk

54. The law of England and Wales distinguishes between proof of a fact which has occurred and the assessment of the likelihood of the occurrence of a fact in the future. In *Mallett v McMonagle* [1970] AC 166 Lord Diplock stated in the context of assessment of damages for personal injury (at p 176E-G):

> "The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."

55. Lord Diplock returned to the issue, this time in the context of extradition, in *R v Governor of Pentonville Prison, Ex parte Fernandez* [1971] 1 WLR 987. Section 4(1)(c) of the Fugitive Offenders Act 1967 prohibited extradition where the requested person "might, if returned, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions". Lord Diplock stated (at pp 993H-994A):

> "For my part I think it only leads to confusion to speak of 'balance of probabilities' in the context of what the court has to decide under section 4(1)(c) of the Act. It is a convenient

> and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences. But the phrase is inappropriate when applied not to ascertaining what has already happened but of prophesying what, if it happens at all, can only happen in the future."

56. The distinction between proof of past facts and prediction of future events is also apparent in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2008] UKHL 35; [2009] AC 11. There Lord Hoffmann explained that the effect of *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 was that section 31(2)(a) of the Children Act 1989 required any facts used as the basis of a prediction that a child is "likely to suffer significant harm" to be proved to have happened. He observed (at para 2):

> "If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened."

57. In *Shagang Shipping Co Ltd (in liquidation) v HNA Group Co Ltd* [2020] UKSC 34; [2020] 1 WLR 3549, paras 98, 99, Lord Hamblen and Lord Leggatt explained that the phrase "a fact in issue" commonly and most usefully refers to those facts which as a matter of law it is necessary to prove in order to establish a claim or a defence. The requirement to discharge the legal burden of proof, which operates in a binary way, applies to facts in issue at a trial, but it does not apply to facts which make a fact in issue more or less probable. Similar reasoning was applied by this court in *R (Pearce) v Parole Board* [2023] UKSC 13; [2023] AC 807 which concerned what approach the Parole Board may properly take, when deciding whether or not to direct the release of a prisoner on licence, to potentially relevant assertions or allegations made about the prisoner which had not been determined, either by the Board or some other body, to be either proved or disproved on the balance of probabilities. Lord Hodge and Lord Hughes concluded that a decision maker, whether a member of the executive branch of government or a judicial body, when assessing future risk, is not as a matter of law compelled to have regard only to those facts which individually have been established on the balance of probabilities. When making an assessment of the evidence as a whole,

the decision maker can take into account (alongside the facts which have been so established) the possibility that allegations which have not been so established may be true.

The Strasbourg case law

58. Under the *Soering* principle, as developed by the Strasbourg court, a Contracting State may violate article 6 by returning a fugitive "where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country" (*Soering* para 113). The Strasbourg court has also confirmed that article 5 can in principle be relied upon in an expulsion case. There is clearly a potential overlap between articles 5 and 6 here, for example where the complaint is one of possible detention after a flagrantly unfair trial. (See *Othman v United Kingdom* at paras 226-234). The formulation of the principle in *Soering* (at para 113) – whether the fugitive "has suffered or risks suffering a flagrant denial of a fair trial in the requesting country" – strongly suggests that a distinction is being drawn between proof of an historical event which has occurred and an assessment of the risk of the occurrence of such an event in the future. (See also *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 per Lord Bingham at para 24.)

59. In the context of extradition, accusation cases give rise to a need to assess whether there is a real risk that the fugitive, on his return, will suffer such treatment. Thus, for example, in *Ahorugeze v Sweden* (2012) 55 EHRR 2 the Strasbourg court stated (at para 116):

> "In executing this test [of a flagrant denial of justice], the Court considers that the same standard and burden of proof should apply as in the examination of extraditions and expulsions under art. 3. Accordingly, it is for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice. Where such evidence is adduced, it is for the Government to dispel any doubts about it."

60. By contrast, alleged violations of article 6 in conviction cases will relate to events which have occurred in the past. Subject to an established exception in the case of torture which is considered below, the usual approach of the Strasbourg court is to require proof of past violations of Convention rights to be demonstrated "beyond a reasonable doubt" in the particular sense in which that term is employed in its jurisprudence. (See, for example, *Gäfgen v Germany* (2011) 52 EHRR 1 at para 92 (article 3); *Ananyev v Russia* (2012) 55 EHRR 18, para 121 (article 3); *Creanga v*

Romania (2013) 56 EHRR 11 at para 88 (article 5(1)); *Simeonovi v Bulgaria* (2018) 66 EHRR 2, para 124 (article 6); *Baka v Hungary* (2017) 64 EHRR 6, para 143 (article 10).)

61. In *Drozd v France* (1992) 14 EHRR 745 a prisoner serving a sentence in a French prison, pursuant to an arrangement between France and Andorra, following his conviction by an Andorran court, complained that his article 5 and 6 rights had been violated by reason of the unfairness of his trial. The Strasbourg court observed (at para 110) that contracting States are "obliged to refuse their cooperation if it emerges that the conviction is the result of a flagrant denial of justice". There was no suggestion that it is appropriate to apply a standard of real risk in such a case where the denial of justice is alleged to have already taken place.

62. In *Merabishvili v Georgia* (2017) 45 BHRC 1 a Grand Chamber of the Strasbourg court described its usual approach to proof of such past violations in the following terms:

> "311. The first aspect of that approach, first set out in *Ireland v UK* (cited above, paras 160–161) and more recently confirmed in *Cyprus v Turkey* (cited above, paras 112–113 and 115) and in *Georgia v Russia* (cited above, paras 93 and 95), is that, as a general rule, the burden of proof is not borne by one or the other party because the Court examines all material before it irrespective of its origin, and because it can, if necessary, obtain material of its own motion. As early as in *Artico v Italy* (App no 6694/74) (1980) 3 EHRR 1, [1980] ECHR 6694/74, para 30, the Court stated that that was the general position not only in inter-State cases but also in cases deriving from individual applications. It has since then relied on the concept of burden of proof in certain particular contexts. On a number of occasions, it has recognised that a strict application of the principle affirmanti incumbit probatio, that is that the burden of proof in relation to an allegation lies on the party which makes it, is not possible, notably in instances when this has been justified by the specific evidentiary difficulties faced by the applicants (see, for example, *Akdivar*, cited above, para 68, in relation to the exhaustion of domestic remedies; *Baka*, cited above, paras 143 in fine and 149, and the examples cited therein, in relation to various substantive articles of the Convention; *JK v Sweden* (App no 59166/12) (2016) 64 EHRR 797, [2016] ECHR 59166/12, paras 91–98, in relation to the risk of ill-treatment in the destination country in removal cases under art 3 of the Convention).

312. Indeed, although it relies on the evidence which the parties adduce spontaneously, the Court routinely of its own motion asks applicants or respondent Governments to provide material which can corroborate or refute the allegations made before it. If the respondent Governments in question do not heed such a request, the Court cannot force them to comply with it, but can—if they do not duly account for their failure or refusal—draw inferences (see *Janowiec v Russia* (App nos 55508/07 and 29520/09) [2013] ECHR 55508/07, para 202, with further references). It can also combine such inferences with contextual factors. Rule 44C(1) of the Rules of Court gives it considerable leeway on that point.

313. The possibility for the Court to draw inferences from the respondent Government's conduct in the proceedings before it is especially pertinent in situations—for instance those concerning people in the custody of the authorities—in which the respondent State alone has access to information capable of corroborating or refuting the applicant's allegations (see, among other authorities, *Timurtas*, cited above, para 66; *Aktas v Turkey* (App no 24351/94) (2003) 38 EHRR 333, [2003] ECHR 24351/94, para 272; and *El-Masri v Former Yugoslav Republic of Macedonia* (App no 39630/09) (2012) 34 BHRC 313, para 152). That possibility is likely to be of particular relevance in relation to allegations of ulterior purpose.

314. The second aspect of the Court's approach is that the standard of proof before it is 'beyond reasonable doubt'. That standard, however, is not co-extensive with that of the national legal systems which employ it. First, such proof can follow from the coexistence of sufficiently strong, clear and concordant inferences or similar unrebutted presumptions of fact. Secondly, the level of persuasion required to reach a conclusion is intrinsically linked to the specificity of the facts, the nature of the allegation made, and the Convention right at stake. The Court has consistently reiterated those points (see, among other authorities, *Nachova v Bulgaria* (App nos 43577/98 and 43579/98) (2005) 19 BHRC 1, (2005) 42 EHRR 933, para 147; *El-Masri*, cited above, para 151; and *Hassan*, cited above, para 48).

315. The third aspect of the Court's approach, also set out as early as in *Ireland v UK* (cited above, para 210), is that the Court is free to assess not only the admissibility and relevance

> but also the probative value of each item of evidence before it. In *Nachova* (cited above, para 147), the Court further clarified that point, saying that when assessing evidence it is not bound by formulae and adopts the conclusions supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. It has also stated that it is sensitive to any potential evidentiary difficulties encountered by a party. The Court has consistently adhered to that position, applying it to complaints under various articles of the Convention (see *Baka*, cited above, para 143, with further references)."

63. *Willcox v United Kingdom* (2013) 57 EHRR SE16, an admissibility decision, may be considered an application of these principles. There, the applicant, who had been convicted of drugs offences in Thailand and transferred to the United Kingdom to serve his sentence, complained that because of the flagrant unfairness of his trial in Thailand, his detention in the United Kingdom violated article 5. The quantity of drugs gave rise at his trial to an irrebuttable presumption that they were in his possession for the purposes of distribution. The Strasbourg court considered that, while the applicant's defence rights were restricted by the operation of the irrebuttable presumption, it could not be said that the very essence of his right to a fair trial was destroyed.

> "Having regard to all the circumstance of the case, the Court considers that the applicant has failed to demonstrate that there has been a flagrant denial of justice in his case. The applicant's continued detention therefore discloses no violation of art. 5(1)(a)." (at para 98)

64. The Strasbourg court in *Othman v United Kingdom* has accepted that there exists an exception to this general approach in cases of evidence obtained by torture contrary to article 3. In *Othman* objection was made to the expulsion of the applicant to Jordan on the ground, inter alia, that some of the evidence which would be used against him on any re-trial in Jordan had been obtained by torture. The Strasbourg court concluded (at para 267) that:

> " … the admission of torture evidence is manifestly contrary, not just to the provisions of article 6, but to the most basic international standards of a fair trial. It would make the whole trial not only immoral and illegal, but also entirely unreliable in its outcome. It would, therefore, be a flagrant denial of justice if such evidence were admitted in a criminal trial."

Without deciding the point, the court did not exclude the possibility that similar considerations might apply in respect of evidence obtained by other forms of ill-treatment falling short of torture. The court then turned to the question whether it was sufficient for this purpose to demonstrate a real risk of the admission of evidence obtained by torture. Incriminating statements against the applicant had been made by Al-Hamasher in one trial and by Abu Hawsher in a second trial. When the case had been before SIAC, that tribunal had found that there was at least a very real risk that these incriminating statements were obtained as a result of treatment that breached article 3 and which may or may not have amounted to torture. The question was therefore whether evidence had been obtained by torture. It might have been expected that the Strasbourg court, acting consistently with its practice described above, would have approached the issue by requiring that this matter of historical fact be proved "beyond a reasonable doubt" in the Strasbourg sense of that term. However, it concluded (at para 273) that even accepting that there was still only a real risk that the evidence against the applicant was obtained by torture, it would be unfair to impose any higher burden of proof on him.

65. The essential reason for this departure was stated (at para 276):

> "Thirdly, and most importantly, due regard must be had to the special difficulties in proving allegations of torture. Torture is uniquely evil both for its barbarity and its corrupting effect on the criminal process. It is practised in secret, often by experienced interrogators who are skilled at ensuring that it leaves no visible signs on the victim. All too frequently, those who are charged with ensuring that torture does not occur – courts, prosecutors and medical personnel – are complicit in its concealment. In a criminal justice system where the courts are independent of the executive, where cases are prosecuted impartially, and where allegations of torture are conscientiously investigated, one might conceivably require a defendant to prove to a high standard that the evidence against him had been obtained by torture. However, in a criminal justice system which is complicit in the very practices which it exists to prevent, such a standard of proof is wholly inappropriate."

66. The court then addressed the situation in Jordan, observing (at para 277) that not only was torture widespread in Jordan but that, so too was the use of torture evidence by its courts. It concluded that, given the absence of any clear evidence of a proper and effective examination of Abu Hawsher and Al-Hamasher's allegations by the State Security Court, the applicant had discharged the burden that could be fairly imposed on him of establishing the evidence against him was obtained by torture. It will be

necessary to return to consider this reasoning further. At this point, however, it may be observed that this is the exception which proves the rule.

67. It appears therefore that, subject to this specific exception in the case of evidence alleged to have been obtained by torture, under the Strasbourg case law the question whether a fugitive had been subjected to a flagrant denial of justice at his trial in the requesting State would be considered a matter of historical fact requiring to be proved in the normal way. It is not a matter of assessment of future risk of a denial of justice but one of proof of a past denial of justice.

English authority

68. Prior to the present proceedings, authorities in this jurisdiction have followed an approach consistent with the general approach of the Strasbourg court.

69. In *Wieslaw Kazimierz Lezon v Regional Court in Tarnow, Poland* [2015] EWHC 1908 (Admin) the appellant was subject to a conviction European Arrest Warrant which requested his return to Poland to serve sentences following convictions for fraud. He resisted extradition, inter alia, on the grounds that his article 6 rights had been infringed at his trials. While accepting that there was no evidence that any assessor at his trials had been influenced by a corrupt prosecutor, he submitted that there was "enough for there to be a 'cause for concern'". He further alleged that at the appeal stage there had been a real risk of interference by the prosecutor with the judges sitting on the appeal so that the process of appeal was tainted. His submission that he needed only to satisfy the real risk test was expressly rejected by Aikens LJ delivering the judgment of the court (at para 22):

> "Because the trial and appeal process has already occurred, it constitutes past fact. Thus the question of whether it was 'flagrantly unfair' is susceptible of proof. In our view, in a situation such as the present, it is for the appellant to establish, on a balance of probabilities, that the process of which he complains had, in fact, been 'flagrantly unfair'. This accords with long-established general principle."

See also *R (Willcox) v Secretary of State for Justice* [2009] EWHC 1483 (Admin), para 30; *Orobator v Governor of Holloway Prison* [2010] EWHC 58 (Admin), paras 96, 118, 120. In *Elashmawy v Court of Brescia, Italy* [2015] EWHC 28 (Admin), a case in which the extradition of the appellant was sought pursuant to a conviction warrant, the Divisional Court held (at para 38) that in order to establish that extradition would be contrary to article 5 "[i]t is clear that the requested person must establish that his trial was *flagrantly* unfair" (original emphasis).

70. Shortly before the decision of the High Court in the present proceedings was handed down Chamberlain J handed down his decision in *Nesin Kaderli v Chief Public Prosecutor's Office of Gebeze, Turkey*. The appellant was sought by Turkey to serve a prison sentence imposed following his conviction for rape. District Judge Goldspring sent his case to the Secretary of State who ordered his extradition. He appealed inter alia on the grounds that there was a real risk that he would be imprisoned in Turkey on the basis of a trial that was flagrantly unfair. In particular, he alleged that he had been asked to pay a bribe to the prosecutor. On behalf of the appellant it was submitted that the District Judge erred in holding that it was for the appellant to prove on the balance of probabilities that the corruption alleged had occurred. The true test, it was submitted, involved the application of a lower standard, namely whether there was a real risk that his conviction was based on a trial tainted by corruption. This submission was rejected by Chamberlain J who held (at para 51) that a person sought pursuant to a conviction warrant who claims that his extradition would be contrary to article 5 because of a flagrant breach of article 6 standards in the trial which led to his conviction "must establish that the trial *was* flagrantly unfair, not merely a real risk that it was" (original emphasis). The concept of real risk was generally used in a forward-looking sense to refer to the probability that an adverse event which had not yet occurred would occur in the future, whereas different concepts such as proof on the balance of probabilities were generally used for establishing how likely it was that something had happened in the past. In his view this reflected the language of *Soering* which suggested a dichotomy between cases where a flagrant denial of justice was in the past or was feared in the future. Having referred to *Drozd v France*, *Ullah* and *Elashmawy*, he concluded that the judge had applied the right test by asking whether the appellant had proved the corruption alleged on the balance of probabilities.

71. To my mind, the reasoning in *Lezon* and in *Kaderli* is compelling. Subject to an established exception in the case of torture, where a fugitive in a conviction case complains that his extradition would constitute a violation of article 5 or 6 ECHR because he has suffered a flagrant denial of a fair trial in the requesting country, one is not concerned with the assessment of the risk of a future occurrence but with the proof of matters of fact which have occurred.

Extension of the Othman exception

72. On behalf of the respondent, Mr Edward Fitzgerald KC draws attention to the conclusion of the High Court (at para 164) that "[t]he evidence shows a real risk that the [respondent] suffered an extreme example of a lack of judicial impartiality, such that there can be no question as to consequences for the fairness of the trial". He submits that there is good reason to extend the approach applied by the Strasbourg court in the case of evidence obtained by torture to cases where corruption and bias are alleged. In this regard he submits, first, that the gravity of the resulting injustice if the allegations are true is so great that it suffices for there to be credible evidence that this may well be the case. Secondly, he submits that, as in the case of torture, bias and partiality are

difficult to prove. The facts are particularly within the knowledge of the judge and the authorities and not readily discoverable by the fugitive who was the defendant in past proceedings. Thirdly, he submits that where a judge, in breach of duty, has failed to disclose the true position, it is not reasonable to impose a greater burden on the fugitive than to establish credible evidence that the judge may well have been corrupt or biased.

73. To my mind, the extension for which the respondent contends would be totally inappropriate. It has no support in the decisions of the Strasbourg court. The exceptional relaxation of the standard of proof in the case of evidence which may have been obtained by torture reflects the unique wickedness of torture and the abhorrence in which its corrupting influence is rightly held. The prohibition on torture is a peremptory norm of customary international law which enjoys the status of *jus cogens* (*A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71; [2006] 2 AC 221 per Lord Bingham at para 33; *Prosecutor v Anto Furundzija* (Trial Judgment) IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY) 10 December 1998.) The UN Convention against Torture, to which 173 states are currently parties, includes in article 15 an express prohibition on the use of evidence obtained by torture. It is well-established that the use in a criminal trial of evidence obtained by torture would necessarily, of itself, give rise to a flagrant denial of justice (*Othman* paras 263, 267). The fundamental nature of the prohibition was emphasised by the Strasbourg court in *Othman* in the following passage (at para 264):

> "More fundamentally, no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately the rule of law itself."

These considerations make the case of evidence obtained by torture unique. It rests not simply on principles concerned with the fairness of the trial but on a wider moral foundation. The matter is placed beyond doubt by the following observation of the Strasbourg court in *Othman* (at para 265) referring to the earlier decision of the court in *Gäfgen v Germany* (2011) 52 EHRR 1:

> "*Gäfgen* reflects the clear, constant and unequivocal position of this Court in respect of torture evidence. It confirms what the Court of Appeal in the present case had already appreciated: in the Convention system, the prohibition against the use of evidence obtained by torture is fundamental.

> *Gäfgen* also confirms the Court of Appeal's view that there is a crucial difference between a breach of art. 6 because of the admission of torture evidence and breaches of art. 6 that are based simply on defects in the trial process or in the composition of the trial court."

It was on this basis that in *Othman* the Strasbourg court acknowledged an exception to the general rule as to the standard of proof, applicable in the case of evidence obtained by torture.

74. For the same reasons I am unable to accept Mr Fitzgerald's alternative argument that the applicable standard of proof should be that which is appropriate in all the circumstances of the case, having regard in particular to the gravity of the allegations or the consequences. In addition, this has no basis in authority and would be unworkable in practice.

The Irish cases

75. The issue of the appropriate standard of proof has also been considered by the Irish High Court in a series of cases. Initially, the Irish courts adopted an approach consistent with that of the Strasbourg court and courts in this jurisdiction. In *Minister for Justice and Equality v Marjasz* [2012] IEHC 233 the Irish High Court (Edwards J) held that the power to refuse surrender on the ground that an extant conviction was the result of an unfair trial "is likely to be exercised very sparingly indeed, and only in cases where it has been established by the clearest and most cogent evidence that there was a truly egregious unfairness in the circumstances of the underlying trial …". This decision was followed in *Minister for Justice and Law Reform v Petrasek* [2012] IEHC 212 and *in Minister for Justice and Equality v Guz* [2012] IEHC 388.

76. In *Minister for Justice and Equality v Rostas* [2014] IEHC 391, however, the same judge, Edwards J, considered (at para 92) that the test stated in *Marjasz* had to be modified in the light of the judgment of the Strasbourg court in *Othman*:

> "That statement requires modification as a result of the decision in *Othman (Abu Qatada)* to the extent that what must be established is not the actual unfairness of the trial process leading to the conviction in the requesting country but rather the establishment of substantial grounds for believing that there is a real risk that the respondent suffered a flagrant denial of justice in the course of that trial process."

As Mr Summers points out on behalf of the appellant, this conclusion is based on a misreading of *Othman* at paras 258-261 and is erroneous. More recently, there has been a return to orthodoxy. In *Minister for Justice and Equality v Lipatovs* [2019] IEHC 126, a case concerning a conviction European Arrest Warrant, Ms Justice Donnelly held (at para 40) that in order to avoid surrender the fugitive "must establish that there was an egregious breach in the system of justice in the issuing state". (See also *Minister for Justice and Equality v Iacobuta* [2019] IEHC 250 at paras 31-34; *Minister for Justice and Equality v Jefisovas* [2019] IEHC 248 at paras 57 – 62.)

77. In coming to its conclusion on the standard of proof the High Court was clearly influenced by the decision of the Irish High Court in *Rostas*. (See Holroyde LJ at para 154 cited at para 39 above.)

Conclusion on the standard of proof

78. For the reasons given above, I consider that the High Court misdirected itself and applied the wrong standard of proof. In the present case it was necessary for Mr Popoviciu to demonstrate not that there was a real risk that the allegations of bias and corruption were true but that the allegations were true on the balance of probabilities. He failed to meet that standard. Had the appellant not withdrawn the European Arrest Warrant dated 3 August 2017, I would therefore have allowed the appeal on this ground and I would have answered the certified question as follows:

> "Subject to an exception in the case of evidence which may have been obtained by torture which is not applicable in this case, in a conviction extradition case it is not sufficient for the requested person to show substantial grounds for believing that there is a real risk that his trial was so flagrantly unfair as to deprive him of the essence of his article 6 rights and therefore a real risk that his imprisonment in the requesting state will violate his article 5 rights. It is necessary for the requested person to prove on the balance of probabilities a flagrant violation of his article 6 rights."

Failure of the High Court to draw correct inferences from the response of Romania

79. In an alternative submission on behalf of the respondent, Mr Fitzgerald submitted that the High Court in its assessment of the evidence did not take account of the failure of the Romanian authorities to put forward any evidence or information to dispel the concerns that arose from the evidence in relation to the respondent's trial.

80. Mr Fitzgerald submitted that there are many situations in which the jurisprudence of the Strasbourg court recognises that a prima facie case of a violation can justify the imposition of a burden on the requesting state to dispel any doubts as to the risk of such a violation. Thus, in *Othman* for example, the Strasbourg court observed (at para 261) that, where the applicant adduces evidence capable of proving that there are substantial grounds for believing that, if removed, he would be exposed to a real risk of being subjected to a flagrant denial of justice, it is for the government to dispel any doubts about it. This has been referred to by the Strasbourg court as "the distribution of the burden of proof". (See *Ananyev v Russia* at para 121.) Similarly, in *Merabishvili* at paras 312 and 313 (cited above at para 62) the Strasbourg court explained how the court can draw inferences from a failure of a government to reply and it noted that the possibility of drawing inferences from the respondent government's conduct of the proceedings is especially pertinent in situations in which the respondent State alone had access to information capable of corroborating or refuting the applicant's allegations. (See also *Baka v Hungary* (2017) 64 EHRR 6, para 143.) Our attention was also drawn to similar authority in relation to the drawing of inferences before the Court of Justice of the European Union (Joined Cases C-562/21 *PPU* and C-563/21 *PPU*, 22 February 2022 at para 94) and in this jurisdiction (*R v Inland Revenue Commissioners, Ex parte T C Coombs & Co* [1991] 2 AC 283, 300F; *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, paras 44, 45.)

81. Mr Fitzgerald pointed to the fact that the High Court found on the basis of the respondent's evidence that Judge Tudoran may well have been corrupt and partial. He submitted, however, that the High Court in its assessment of the evidence did not include the fact that the appellant had failed to deny the allegation of an improper relationship or in any way to engage with that allegation.

82. In response to a request for further information about the relationship between Judge Tudoran and Becali, made by those acting for the appellant, the Prosecutor's Office of the High Court of Cassation and Justice in Romania responded on 2 February 2021 in the terms set out at para 30, above.

83. This is, indeed, a very brief and limited response. However, contrary to the submission on behalf of the respondent, it does not amount to an admission. Furthermore, the High Court was well aware of the response, Holroyde LJ having set it out at para 111 of his judgment. Having summarised (at para 162) the evidence which led him to accept that the allegations against Judge Tudoran may well be true, he was very critical of the response, stating (at para 163):

> "The [Prosecutor's Office] has plainly failed to put forward any evidence or information which dispels these concerns. There is no basis on which I could reject the response of the [Prosecutor's Office] to a formal request for information

> about the relationship between Judge Tudoran and Becali; but I agree with Mr Fitzgerald that it was very unsatisfactory. I would have expected the [Prosecutor's Office], in addition to denying any knowledge of such a relationship at the time of the trial to investigate whether such a relationship did in fact exist. I also agree with Mr Fitzgerald that it is a surprising aspect of the Romanian criminal justice system if the late discovery of an undisclosed friendly relationship between a trial judge and an important prosecution witness 'would not constitute a reason to review a final decision'".

84. Although this assessment of the response is not in the same paragraph of the judgment as that in which the conclusion is stated that while the allegations may well be true they were not proved on the balance of probabilities, it immediately follows that paragraph and would clearly have been a factor taken into account by Holroyde LJ in coming to his overall conclusion. At para 163 he did draw inferences from the inadequacy of the response. However, they were weak inferences and Holroyde LJ clearly did not consider them sufficient to carry the allegations made by Mr Popoviciu over the line of establishing on the balance of probabilities a flagrant violation of fundamental rights. This conclusion was reached on his evaluation of all the evidence in the case. He was entitled to come to that conclusion and there is no basis on which this court could properly interfere with it (*Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 per Lewison LJ at para 114).

85. It will be necessary, however, to return to the statement in the response from the Prosecutor's Office that the late discovery of an undisclosed friendly relationship between a trial judge and an important prosecution witness would not constitute a reason to revise a final decision.

Remittal to consider further fresh evidence

86. On behalf of the respondent, Mr Fitzgerald submitted that if the appeal succeeds on the ground that the High Court applied the wrong test, this matter should be remitted to the High Court to enable it to consider what is described as "powerful new and additional evidence of Judge Tudoran's corruption and improper links with Becali that were not before the High Court".

87. Section 27 of the 2003 Act provides that on an appeal against an extradition order under section 26, the appeal may be allowed if the conditions in section 27(4) are satisfied. The conditions, so far as relevant, are that evidence is available that was not available at the extradition hearing, that the evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently

and that if he had decided the question in that way, he would have been required to order the person's discharge. In *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin); [2009] 4 All ER 324, a Divisional Court decision on the parallel provision in section 29(4) of the Extradition Act, Sir Anthony May P made two matters clear. First, 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. Secondly, the court needs to decide that, if the evidence had been adduced, the result would have been different resulting in the person's discharge. The President made clear (at para 32) that this is a strict test consonant with the Parliamentary intent and that of the European Framework Decision (2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States) 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.

88. A significant amount of evidence alleging judicial corruption on the part of Judge Tudoran was placed before the High Court. When appealing to the High Court the respondent made seven applications to adduce fresh evidence. The High Court admitted some of the new evidence and also permitted Mr Dojana to give oral evidence. The respondent then made a further application, this time to the Supreme Court, to adduce further evidence on which he sought to rely if the appeal were allowed and the matter remitted to the High Court. This application was supported by a witness statement dated 13 January 2023 by Mr Doobay, the respondent's solicitor, to which were exhibited three statements by Dr Opris, Mr Andronic and Mr Bozdoro.

89. Dr Opris had issued a complaint against Judge Tudoran to the body responsible for investigating criminal conduct by judges in Romania. This complaint was relied upon by the respondent as evidence of bias on the part of Judge Tudoran and was considered by the High Court in the present proceedings, having been admitted following a fresh evidence application. The new witness statement of Dr Opris, on which the respondent sought to rely upon a remittal to the High Court, was produced on 12 July 2021, following the High Court judgment pronounced on 11 June 2021. It confirms that he submitted his complaint against Judge Tudoran to the SIIJ and makes further allegations in relation to criminal activities on the part of Judge Tudoran and his involvement with Becali. The respondent submitted that the statement satisfied the first limb of the *Fenyvesi* criteria because it did not exist at the time of the High Court hearing. However, it is clear that the respondent's legal team were in contact with Dr Opris and aware of his potential as a witness, given the contents of his complaint to the SIIJ, before the High Court hearing. No reason was given as to why the respondent's legal team could not have obtained the evidence in his latest statement with reasonable diligence before the hearing in the High Court. In this regard Mr Summers drew the court's attention, in particular, to a witness statement by Mr Mihai Ciorcan, an investigative journalist assisting the respondent, dated 10 September 2020, some six months before the High Court hearing, in which Mr Ciorcan sets out information he

says was provided to him by Dr Opris concerning allegations of corruption against Judge Tudoran in his relationship with Becali. In these circumstances the first *Fenyvesi* criterion is not satisfied.

90. Secondly, the respondent sought to rely on remittal of his case to the High Court on a statement by Mr Aurel Andronic. It was said that on 25 February and 5 March 2021 Mr Andronic alleged on a Romanian television programme that he had paid a bribe to Judge Tudoran in return for a favourable outcome in a criminal appeal. No satisfactory explanation was provided as to why it was not possible to rely on this evidence in the proceedings before the High Court which began on 15 March 2021. Furthermore, Mr Summers drew our attention, in particular, to the statement of Mr Ciorcan in his statement of 10 September 2020 that on 10 August 2020 he assisted with testimony of Mr Andronic who gave evidence that he paid a bribe to Judge Tudoran for favourable treatment of his criminal case and that Mr Andronic had since made a complaint which was being investigated by the SIIJ. Once again no satisfactory reason was given why the respondent's legal team could not have obtained the evidence in his latest statement with reasonable diligence before the hearing in the High Court.

91. Thirdly, similar considerations apply in relation to the statement of Mr Bozdoro who was the co-defendant in the criminal proceedings in which Judge Tudoran allegedly accepted a bribe from Mr Andronic. The same conclusion can be drawn in respect of this evidence. The respondent's legal team and their witness Mr Ciorcan were aware of Mr Andronic and, by extension, Mr Bozdoro, sufficiently in advance of the High Court hearing to obtain their evidence with a reasonable degree of diligence.

92. In these circumstances the further evidence on which the respondent sought to rely does not satisfy the first *Fenyvesi* criterion. It is, therefore, not strictly necessary to address the question whether the evidence is capable of being decisive under the second criterion. However, it should be noted that the High Court found that the Opris complaint, with the statements of Mr Dojana and Mr Dumitrescu, provided credible evidence of improper conduct on the part of Judge Tudoran and of Judge Tudoran's undisclosed relationship with Mr Becali. In my view, the further evidence in these statements is of limited significance when considered against the earlier evidence and could not have the decisive effect required by the second *Fenyvesi* criterion. Furthermore, as a result, this is not a case in which a degree of latitude in applying the criteria must be introduced in order to comply with the Human Rights Act 1998.

93. Had the appellant not withdrawn the European Arrest Warrant, I would, therefore, have refused to admit the further evidence and would have dismissed the application that the proceedings be remitted to the High Court for consideration of the further evidence.

Remittal to consider the lack of a remedy in Romania

94. In its response dated 2 February 2021 the Prosecutor's Office stated that even if a friendly relationship was proved between Judge Tudoran and Becali, that would not constitute a reason to review the decision in the criminal proceedings according to the Romanian legislation in force. This statement gave rise to a further issue between the parties.

95. As we have seen, in his judgment in the High Court Holroyde LJ referred (at para 163) to this matter and observed that it is a surprising aspect of the Romanian criminal justice system if the late discovery of an undisclosed friendly relationship between a trial judge and an important prosecution witness would not constitute a reason to review a final decision.

96. On 28 March 2023, less than two months before the date listed for the hearing of this appeal in the Supreme Court, the appellant applied for permission "to adduce clarificatory evidence". The application referred to the statement in the letter of 2 February 2021 and explained that this had been taken before the High Court as meaning that an undisclosed friendly relationship between a trial judge and an important prosecution witness would never constitute a basis to set aside a conviction and order a retrial. The application stated that this was not an accurate statement of Romanian law: while such an acquaintance would not automatically lead to the setting aside of a conviction and an order for retrial, there exists a procedure by which a convicted defendant can file for a revision of the trial court's final decision. It produced a statement by Alexandra Carmen Lancranjan, Chief Prosecutor of the Liaison Office of the DNA which stated that in criminal matters a final decision can be reviewed and the case reopened if the conditions for one of the extraordinary appeal procedures are met (articles 426 and 452 of the Criminal Procedure Code). There was also the possibility of filing for revision of the final decision (articles 453, 457 of the Criminal Procedure Code). As a last resort the Criminal Procedure Code provides for a retrial where the Strasbourg court decides that there has been a violation of an ECHR right.

97. On 4 April 2023 the respondent lodged a notice of objection to the application. The Supreme Court Registry notified the parties that the appellant's application to adduce fresh evidence would be adjourned to the substantive hearing.

98. The respondent then applied to supplement his objection with the expert report of Dr Radu Chirita dated 27 April 2023. In that report Dr Chirita explained that while a final decision could in strictly limited situations be reviewed in extraordinary appeal proceedings, the circumstances of the present case and the findings of the High Court did not fall within any of these limited situations. He explained in detail why, in his opinion, the present case did not fall within either article 453(1)(a) or article 453(1)(d).

He stated that there were no other grounds under Romanian law for the review of the decision.

99. On 11 May 2023 the appellant made a further application to the Supreme Court for permission to adduce clarificatory and supporting material in the form of a letter from the Chief Prosecutor of the Liaison Office in Romania dated 8 May 2023. In this letter Chief Prosecutor Lancranjan joined issue with Dr Chirita, in particular on articles 426, 433 and 452-465. In addition, she contended that Mr Popoviciu could challenge the decision under article 20 of the Constitution which permits the direct enforcement of the European Convention on Human Rights.

100. On 12 May 2023 the respondent lodged a Note in response to the report of Chief Prosecutor Lancranjan accompanied by a second opinion by Dr Chirita dated 12 May 2023, responding to the letter of Chief Prosecutor Lancranjan dated 8 May 2023. In particular Dr Chirita accepted that article 20 of the Constitution provides that if there are contradictions between the European Convention on Human Rights and internal laws the Convention takes precedence. However, he stated that there was very little national practice on direct application of the Convention and the case law was broad and inconsistent. This made the outcome of such an application unpredictable.

101. On 15 May 2023 the respondent filed an application to adduce further materials including the second report of Dr Chirita and a statement dated 13 May 2023 by Dr Bogdan Micu, responding to comments made by Chief Prosecutor Lancranjan in her letter of 8 May 2023 concerning the making of criminal complaints against Judge Tudoran.

102. The European Arrest Warrant against the respondent was made as long ago as 3 August 2017. It is totally unsatisfactory that the parties should have engaged in this flurry of applications to produce further evidence at such a late stage in the proceedings and so shortly before the dates fixed for the hearing of this appeal (16 and 17 May 2023). At the hearing we told the parties that we would consider the further evidence de bene esse. It is clear, however, that the conflicting evidence in relation to Romanian law cannot be resolved without the cross examination of the experts.

103. Against this background Mr Fitzgerald submitted on behalf of the respondent that there were substantial grounds to believe that the respondent faces a real risk of a prospective flagrant denial of his rights to liberty as protected by article 5 and to a fair trial under article 6 arising from the absence of any remedy in the requesting state. While article 5(1)(a) permits the lawful detention of a person after conviction by a competent court, it was submitted that a judge who may well have been partial and corrupt is not a competent court for these purposes.

104. Mr Summers, on behalf of the appellant, very properly accepted that article 5(4) requires that there must be a legal mechanism which is capable of assessing the lawfulness of detention when, following a conviction, new issues arise concerning the lawfulness of the detention.

105. *Etute v Luxembourg* (2018) Application No. 18233/16 is a case in point. There the applicant had been imprisoned following his lawful conviction for a drugs offence. He was granted conditional release from detention but the conditional release was revoked on grounds of breach of conditions. The Strasbourg court held (at paras 25, 26):

> "25. According to the Court's case-law, in the case of detention following 'conviction by a competent court' within the meaning of Article 5(1)(a), the supervision intended by Article 5(4) is included in the judgement and this provision does not require separated oversight of the lawfulness of the detention (*De Wilde, Ooms et Versyp*, cited above, para 76). However, if new issues regarding the lawfulness of the detention were to arise after the judgement, Article 5(4) applies again and requires judicial review of the lawfulness of the detention (see *Ivan Todorov v Bulgaria*, no 71545/11, para 59, 19 January 2017 as well as the references cited therein).
>
> 26. Thereupon the Court must decide any new issues of lawfulness and if there are any, which ones can arise over the return to prison of the applicant in 2015 and his subsequent detention to enforce his sentence, and if the remedies open to him were in line with Article 5(4) (*Weeks v United Kingdom*, 2 March 1987, para 56, series A no 114)."

106. It was common ground between the parties that in addressing this issue the court is concerned with the situation which will confront the respondent if he is returned to Romania and that the applicable standard of proof is whether there is a real risk that he will be denied an effective means of challenging the legality of his detention on the ground that his trial was a violation of his article 6 rights.

107. We are here concerned with the availability of an effective remedy in Romania. The availability of an application to the Strasbourg court does not meet the requirements of article 5. Contrary to the submission on behalf of the appellant, the experts are not agreed that there is an effective remedy in Romania pursuant to article 20 of the Constitution. Furthermore, contrary to the submission on behalf of the appellant, the present proceedings before the courts of England and Wales cannot be considered as relieving Romania of the obligation to provide an effective remedy. The review which

has taken place here is within the limited jurisdiction of proceedings on a European Arrest Warrant. The respondent maintains that he has encountered difficulty in obtaining information and evidence. The Romanian authorities would be obliged to co-operate with any article 5 and 6 compliant proceedings in Romania.

108. Having regard to the findings of the High Court in these proceedings, I am persuaded that the point is arguable. Notwithstanding the manner and the late stage in the proceedings at which the issue of the availability of an effective remedy in Romania has arisen, I consider that, in order to comply with the *Soering* principle, it would be necessary to remit this specific issue to the High Court with a direction that it consider the availability to the respondent, if returned to Romania, of an effective legal procedure which would enable him to make his case concerning the fairness of the Romanian proceedings and the legality of his detention. Had the appellant not withdrawn the European Arrest Warrant, I would, therefore, have remitted this issue to the High Court for its consideration.

Conclusion

109. In light of the appellant's withdrawal of the European Arrest Warrant, it has been necessary to dismiss the appeal pursuant to section 43(4) of the 2003 Act.