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Case No: AC-2023-LON-003621
Case No: AC-2024-LON-003306

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2025

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE JAY

- -

Between:

(1) SHAZIM NICHOLAS MOHAMMED
(2) ANDREI MUGUREL OPREA

Appellants

- and –

(1) LAW COURT OF ARAD, ROMANIA
(2) BUCHAREST REGIONAL COURT, ROMANIA

Respondents

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- -

Ben Watson KC and Douglas Wotherspoon (instructed by **Sperrin Law**) for the **First Appellant**
David Perry KC and Laura Herbert (instructed by **Bark & Co**) for the **Second Appellant**
Joel Smith KC and David Ball (instructed by **CPS Extradition Unit**) for the **Respondents**

Hearing dates: 18 and 19 June 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 2 July 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 JAY

MR JUSTICE JAY:

INTRODUCTION

1. These are conjoined appeals brought under s. 26 of the Extradition Act 2003 ("the 2003 Act") by the First Appellant, Mr Shazim Mohammed ("Mr Mohammed") and the Second Appellant, Mr Andrei Oprea ("Mr Oprea"). Both men are sought by the relevant Romanian judicial authorities ("Romania") pursuant to conviction warrants. At an earlier stage before joinder, District Judge John Zani ("the District Judge") heard their extradition cases on separate occasions, handing down his judgments on 20 November 2023 and 7 October 2024 respectively.

2. The issue common to both appeals is that of deliberate absence under s. 20(3) of the 2003 Act. More specifically, in Mr Mohammed's case the issue is whether, the point not having been taken below, this Court should conclude to the requisite standard that Mr Mohammed was deliberately absent having regard to all the evidence now available. In Mr Oprea's case the issue is whether the District Judge was entitled to conclude that he deliberately absented himself from his criminal trial in Romania.

3. In addition, Mr Mohammed and Mr Oprea both raise separate arguments. Mr Mohammed has permission to advance grounds on Article 3 (prison conditions) and s. 14 of the 2003 Act (oppression/passage of time); and he applies to re-open my decision to refuse permission on his Article 8 ground at a hearing which he did not attend. Mr Oprea has permission to advance an Article 8 ground. I will address those additional matters after considering the common issue.

4. Mr Mohammed was represented by Mr Ben Watson KC and Mr Douglas Wotherspoon. Mr Oprea was represented by Mr David Perry KC and Ms Laura Herbert. Romania was represented by Mr Joel Smith KC and Mr David Ball. The Court is grateful for the clarity and economy of their written and oral arguments.

ESSENTIAL FACTUAL BACKGROUND: MR MOHAMMED

5. Mr Mohammed was born on 12 September 1996 in Trinidad and Tobago and has lived in the UK since he was 7. He remains a national of Trinidad and Tobago and has indefinite leave to remain in the UK. In late November 2018 he travelled with his wife, Ms Karishma Suneechur, to Romania to commit the index offences. Those relate to the hiring of luxury vehicles which were never returned. Mr Mohammed and Ms Suneechur were arrested on 2 December 2018 when attempting to leave the country. On 3 December Mr Mohammed was interviewed. According to the judgment of the Timisoara Court of Appeal, Criminal Division given on 21 September 2024, the case file shows that Mr Mohammed was interviewed as a suspect and then as a defendant. My interpretation of this judgment is that Ms Suneechur was interviewed on the same basis but on 28 January 2019. Although Mr Mohammed accepted hiring the luxury vehicles, he denied that this was done for a fraudulent purpose. On 3 December 2018 Mr Mohammed signed a notification that he was being charged, and he was then bailed between that date and 31 January 2019.

6. Romania's case is that on 3 December 2018 Mr Mohammed was informed that he was under an obligation under Article 108 of the Code of Criminal Procedure to provide an address at which he could be summoned and appear when summoned, and that he would have to inform Romania of any change of address within 3 days. Mr Watson drew our attention to the terms of this provision. He correctly pointed out that Article 108 does not oblige the relevant authorities to warn a defendant that he might be tried in his absence. The address Mr Mohammed gave was at Pycroft Way in Edmonton. In December 2018 this was the home address of Mr Mohammed and his wife.

7. Mr Watson points out that, according to expert evidence he has served, there is no obligation under Romanian law to translate the document containing the requirements of Article 108. That is disputed by Mr Smith. According to the decision of the Timosoara Court of Appeal, the court file shows that the Article 108 obligations were translated by an interpreter and communicated to Mr Mohammed (and to his wife, albeit on a later occasion):

> "… a fact evidenced by the notification they were being charged, which was signed by the defendants and by the interpreter."

8. After 2 months on conditional bail, Mr Mohammed then returned to the UK. On 28 September 2020 an indictment was lodged in relation to him and he was summoned at the Pycroft Way address. By that stage he had moved to an address in London N18. It is common ground that Mr Mohammed did not inform Romania of his new address. According to the Further Information provided by Romania, Mr Mohammed was summoned by letter sent to his old address which was returned to the sender, and "by posting on the court door for the court hearings". Confusingly, in the Further Information Romania accepts that box 3.1(b) of the European Arrest Warrant ("EAW") issued on 19 December 2022 should not have been completed in the manner in which it was because "he did not receive official notification of the date and place set for the trial before the Arad District Court". In fact, this box was not ticked and in the EAW Romania relied instead on Mr Mohammed's right to apply for a retrial. On the other hand, Romania asserts that Mr Mohammed was "aware of the criminal charges brought against him and the existence of proceedings". On Romania's case, that information was communicated to Mr Mohammed in December 2018.

9. Mr Mohammed's trial proceeded in his absence. He was represented by a court appointed lawyer, convicted and sentenced to 2 years' merti on 2 August 2022. Mr Mohammed was arrested pursuant to the EAW at the N18 address on 11 May 2023. He told police that he was "aware and thought the matter was dealt with as he attended Court in Romania when the incident first occurred".

10. On 30 November 2023 the District Judge ordered the extradition of Mr Mohammed but not of his wife. The issue of deliberate absence was not argued before the District Judge because on existing authority it would have had no prospect of success. The evidence before the District Judge on the issue I have been addressing was limited. The text of Article 108 and the decisions of the lower Court and the Timosoara Court of Appeal have come late to this case in the form of Further Information served by Romania and an application by Mr Mohammed to adduce fresh evidence.

11. According to Mr Mohammed's proof of evidence, he asserted that he had been arrested in Romania and been asked to stay for 2 months. He stated that he "complied with the

police" and gave them some assistance in recovering the stolen cars, provided them with his UK address and other unspecified contact details, and had been allowed to leave the country in February 2019. He asserted that he and his wife were "told that the case had been concluded". Further:

> "My wife and I returned to the UK and tried to forget about the whole situation. I have not heard from the Romanian authorities since. I assumed that the case was over and it never crossed my mind that there may be a trial against me. … If I had been informed of a trial against me, I would have complied with orders."

12. Ms Suneechur also gave oral evidence. On a date which on her account must have been 3 December 2018, she said that she and her husband were told that they could either serve a prison sentence of 2 weeks or they could stay in Arad on bail for 2 months and sign on at the police station every Friday at 9am. They agreed to the latter. At some unspecified point she said that she gave the police her email address. When they left the country in February 2019, she believed that it was the end of the case. Under cross-examination, Ms Suneechur stated that she understood the 2 months to have been a "sentence", albeit she had pleaded not guilty. The District Judge made no finding on this issue. In his view, Ms Suneechur was an honest witness and the District Judge accepted her evidence when it came to Article 8. Mr Smith submits, with some force in my view, that the District Judge's assessment of Ms Suneechur was made without the benefit of the further material to which I have referred. It was also made in the context of s. 20(3) not having been raised.

13. On 9 May 2024 Mr Mohammed applied to the Arad County Court for a retrial. This was on the basis that he was not aware of the proceedings and was convicted in his absence. On 20 June 2024 the Arad County Court refused the application. The Court noted that Mr Mohammed was summoned at the Pycroft Way address which he had provided to the police. Given that he was obliged to inform Romania of any change of address within 3 days, he was therefore properly summoned at the old address. In any event, the Court concluded that Mr Mohammed was aware of the proceedings because he was interviewed as a suspect and then as a defendant. In short:

> "… [Mr Mohammed and his wife] were made aware of the accusations during the investigation, there was a formal notification in relation to the charges brought against them, consequently, one cannot doubt that they were aware of the court case against them."

14. Mr Mohammed appealed this decision to the Timosoara Court of Appeal whose reasons for rejecting his case were as follows:

> "… in this case their subsequent non-attendance in court equals to the explicit and unequivocal decision of the appellants to not participate in the criminal proceedings and to accept the consequences of being tried in absentia, as after the formal notification of the charges brought against them, they did not fulfil their obligation to inform the authorities of their new domicile or living address."

15. As I have said, the issue of deliberate absence did not arise before the District Judge. The issue of oppression/passage of time clearly did arise and in that context the question of whether Mr Mohammed was a fugitive was of course highly material. Mr Watson sought to persuade us that the issues of fugitive status and deliberate absence were one and the same, but I cannot agree. The issue of deliberate absence is a narrower and more focused one, as Mr Perry correctly submitted when he came to analyse the authorities. It follows that, although Mr Mohammed's evidence was to some extent tested in cross-examination – and he said in terms (according to para 21 of the District Judge's ruling) that he and his wife were told that "all was done" and that they would not need to return to Romania – there was no close attention to the terms of s. 20(3) and the requirements of Supreme Court authority which post-dated the hearing. Further, when it came to closing submissions it appears that the issue of fugitive status was conceded by Romania.

16. What is clear is that, s. 20(3) not having been placed in issue by Mr Mohammed, the District Judge was not required to make a finding on it; and he did not do so. Mr Watson's skeleton argument in this appeal raised both s. 20(3) (in respect of which he believed he was pushing at an open door) and s. 20(5) (at that stage, believed to be the main battleground). In the event, Mr Smith conceded the s. 20(5) issue in his skeleton argument and focused on s. 20(3). In these circumstances, I would not describe Mr Smith as having performed some sort of volte-face: the s. 20(3) point was not taken below by Mr Mohammed. Romania is not to be criticised in any way, although I repeat my observation that neither should Mr Mohammed. The law has moved in his favour since the handing down of the District Judge's ruling.

17. I will address other evidence relevant to Mr Mohammed's case in the context of his specific arguments on Article 3, oppression and Article 8.

ESSENTIAL FACTUAL BACKGROUND: MR OPREA

18. Mr Oprea was born on 9 October 1990.

19. On 22 April 2013 Mr Oprea mediated the illegal transport and sale of 1kg (worth approximately €4,700) of cannabis resin-hashish. He was convicted in his presence on 30 May 2013 after pleading guilty. His sentence, following a prosecution appeal, was 2 years' imprisonment and he has 41 days left to serve, having been released from custody on 8 March 2016. Further, between 15 December 2014 and 22 January 2015, whilst he was serving the first sentence, he messaged two individuals from prison suggesting that for a fee of €500,000 he could influence the outcome of a criminal trial. He organised the receipt of €200,000 as an initial payment which was delivered in a package to an associate. The criminal trial was not in fact influenced. Mr Oprea's associates were intercepted in January 2015 taking receipt of the money. I will refer to this later offending as the "fraud offending".

20. On 15 December 2014 criminal proceedings were initiated for the fraud offending. On 23 January 2015 Mr Oprea was told that he was a suspect on the charge of "influence peddling" under Article 291(1) of the Criminal Code, and was also told that he was under an obligation to inform the authorities of any change of address within 3 days

and that summonses and other documents might be served by sending them to that address. According to Further Information provided by Romania:

> "… once there is a reasonable suspicion that a person has committed an offence, further criminal proceedings are ordered against that person, at which point he or she becomes a suspect and a criminal charge is formally made."

21. I accept Mr Smith's submission that the relevant date for considering when Mr Oprea was charged with a criminal offence was 23 January 2015. For this purpose it matters not that the charge was amended on 12 May 2016 and that what we would call the indictment, alleging an offence under Article 291(1), read with reference to another provision of the Code, was not preferred until either June or September 2017 (there is some confusion in the Romanian documents as to exactly when).

22. Mr Oprea was interviewed on 11 August 2015. He declined to answer questions. He was informed once again of his obligation to appear when summoned and to inform the authorities of a change of address within 3 days.

23. On 8 March 2016 Mr Oprea was released from prison and likely came to the UK almost immediately.

24. On 10 May 2016 Mr Oprea was summoned by telephone to appear at 9am on 13 May at the prosecutor's office. He stated that he would appear but he did not. An arrest or bench warrant was issued on 13 May. Mr Oprea's address in Romania was visited and his father told police that he was not at home but working in England.

25. On 17 May 2016 a further bench warrant was issued. On the same day he was contacted by Romania and was informed of the position. Mr Oprea stated that he was in England but that he would appear at the time and date of the bench warrant. He did not.

26. On 12 July 2016 a further bench warrant was issued. Mr Oprea was not at the address he had provided in Romania and his father repeated that his whereabouts were in England.

27. A further arrest warrant was issued on 5 August to compel Mr Oprea's attendance before the prosecutor's office. He did not attend. Four days later he was contacted by phone and informed of the bench warrant. He said that "he did not believe he could be present".

28. Further warrants were issued on 3 and 27 February 2017. Mr Oprea's mother told police that he was in England and that she did not know when he would return.

29. Following the prosecutor's order of 23 June 2017, on 14 August Mr Mohammed was again summoned at his Romanian address but no one was at home. On 7 September 2017 a provisional warrant for arrest *in absentia* was issued. On 25 September 2017 an accusation European Arrest Warrant ("the EAW") was issued in relation to the fraud offending. Mr Oprea was arrested under the EAW but was discharged on 9 February 2018 because Romania had given no assurances in relation to prison conditions.

30. Mr Oprea was found guilty in his absence of "influence peddling" on 17 May 2018. This conviction became final by a decision of the Bucharest Court of Appeal on 1 October 2018. The sentence imposed on that occasion means that the total time left to be served for both offences is 4 years and 41 days. A request for an EAW based on this conviction was issued on 1 October 2018. An Arrest Warrant under the Trade and Co-Operation Agreement was issued on 24 August 2024.

31. At the hearing before the District Judge, Mr Oprea relied on s. 20 of the 2003 Act (re-trial rights), "non-State actors" (Article 3) and Article 8. The Article 3 point is no longer in issue.

32. Mr Oprea's proof of evidence before the District Judge stated that he had attended a "couple of proceedings" in his case, had instructed a lawyer, and that the court had been given his parents' address but they had never received a summons. Mr Oprea's oral evidence was as follows:

> "I do not accept that I was charged. No conditions were imposed on me upon release though I was aware that at some point I would face trial. … I did not mean to say that I would face trial as an accused person but that I might be called as a witness. I did not receive any letter stating that I had to notify any change of address."

Mr Oprea denied receiving the phone calls from Romania instructing him to answer the bench warrants.

33. In his ruling handed down on 7 October 2024, the District Judge addressed the s. 20(3) issue under the rubric of "fugitivity" but in my view nothing turns on that. Although the concepts are not identical, the District Judge made a relevant finding on the key question before this Court. The District Judge cited relevant Supreme Court authority. He found that Mr Oprea was deliberately absent from the proceedings and that he had not been honest in his evidence. In particular, the District Judge disbelieved Mr Opera's account that he had no knowledge or recollection of any obligation to notify a change of address within 3 days, and Mr Oprea's assertion that he did not promise to attend hearings and/or that he had not been contacted as asserted by Romania. The District Judge held that Mr Oprea was present when informed that there were charges against him and that he had to inform the authorities of any change of address. He was clearly aware that he faced court proceedings on release but chose to leave the country without giving his new address to the relevant authorities. The District Judge found that Mr Oprea was repeatedly reminded of the need to attend proceedings by phone but did not. He deliberately absented himself when informed of the bench warrant on 9 August 2016. In short, Mr Oprea:

> "… can reasonably be considered to have made himself deliberately absent from the ongoing proceedings."

34. However, when the District Judge came to set out his ruling on the s. 20 challenge, he did not deal with it under sub-section (3), despite having found that Mr Oprea had deliberately absented himself, but instead chose what he believed was the more straightforward route of s. 20(5) and the ticking of box 3.4 in the Arrest Warrant. Mr Smith does not seek to defend the District Judge's decision on that basis. He relies

instead on the anterior question of deliberate absence and the findings of fact I have summarised.

35. I will address other evidence relevant to Mr Oprea's case in the context of his specific arguments on Article 8.

LEGISLATIVE FRAMEWORK AND RELEVANT SUPREME COURT AUTHORITY

36. Section 20 of the 2003 Act provides in material part:

> "**20 Case where person has been convicted**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
>
> (7) If the judge decides that question in the negative he must order the person's discharge.
>
> …"

37. Both Appellants were convicted in their absence (sub-section (1)). The material question in this case is that of deliberate absence under sub-section (3). In the event that this Court rules against Romania on this issue, it is conceded by Mr Smith, in light of the further material that has been filed on this topic, that the issue under sub-section (5) does not arise because neither Mr Mohammed nor Mr Oprea would be entitled to a re-trial. In these circumstances it is unnecessary for me to examine the decision of the Supreme Court in *Merticariu v Judecatoria Arad, Romania* [2024] UKSC 10; [2024] 1 WLR 1506.

38. The leading authority on the issue of deliberate absence is now *Bertino v Public Prosecutor's Office, Italy* [2024] UKSC 9; [2014] 1 WLR 1483.

39. On the facts of *Bertino*, the appellant was convicted in his absence in the Court of Pordenone of sexual activity with an under-age person. The material facts are set out in the joint judgment of Lord Stephens JSC and Lord Burnett of Maldon:

> "4. The offence was alleged to have taken place on 19 June 2015 in the Province of Venice at a holiday camp at which the appellant was working as an entertainer. The police were informed promptly of the allegation and attended the appellant's place of work. His phone was seized. The formal information provided by the requesting judicial authority in response to a request for further information issued by the Crown Prosecution Service confirms that the appellant was not arrested or questioned formally at the time, although it appears from the appellant's own account that he went to the local police station. The appellant was sacked from his job and returned to Sicily from where he came. He later voluntarily attended the police station in Spadafora, Sicily on 23 July 2015. He signed a document which recorded that he was under investigation. The document invited the appellant to elect domicile in Italy. The document stated that "as [the appellant] is being investigated, he is under an obligation to notify any change of his declared or elected domicile by a statement to be rendered to the judicial authority". It also warned "that if [the appellant] does not notify any change of his declared or elected domicile ... the service of any document will be executed by delivery to the defence lawyer of choice or to a court-appointed defence lawyer." The appellant elected his domicile by giving an address in Venetico, Messina. He also indicated on the form that he "will be assisted by a defence lawyer that will be appointed by the court." The document was read to him by the judicial police officer. Both he and the police officer signed the document of which the appellant was given a copy.
>
> 5. The appellant left Italy in November 2015 and came to the United Kingdom. He found work and moved from time to time. The prosecution in Italy was commenced on 8 June 2017. A writ of summons for the hearing set by the judge was issued on 12 June 2017. It summoned the appellant to appear at the Pordenone Court on 28 September 2017 and included a warning that non-attendance without "lawful impediment" would "lead to a judgment in absentia". The appellant did not receive the summons. By that date the requesting judicial authority knew that he was no longer at the address he had provided in July 2015. In information provided by the requesting judicial authority to the High Court of England and Wales dated 16 January 2022 it confirmed that "service of the judicial document failed because the addressee was untraceable ...[T]he writ of summons was served on the court-appointed defence counsel ... because Mr Bertino had failed to notify any change of address." The requesting judicial authority made various unsuccessful attempts to trace the appellant in Italy between 2016 and 2019. They eventually obtained contact details at an address in England in January 2019 and were given his mobile telephone

> number by his mother. These factual details are found in further information provided by the requesting judicial authority during the extradition proceedings. The appellant's unchallenged evidence before the District Judge was that he notified the authorities of his departure to the United Kingdom for family law purposes (his marriage was failing and arrangements had to be made for the children) but not the police in connection with the investigation."

40. Thus, the key features of *Bertino* were that he was that he was an individual under investigation but who had not been charged, that he had been informed by the Italian authorities at the time that he was only a suspect but that it was incumbent on him to notify them of any change of address, and that when he came to the UK he did not do so.

41. At para 26 of its judgment the Supreme Court endorsed the decision of this Court (Burnett LJ and Irwin J) in *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin); [2016] 1 WLR 3344 to the effect that "trial" in section 20(3) "suggests an event with a scheduled time and place and is not referring to a general prosecution process", and "an accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(1)(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate Article 6 of the Convention". Neither Mr Watson nor Mr Perry submitted that in order to be deliberately absent from his trial an accused must be aware of the scheduled trial date and place. Mr Watson's submission was that the further one is away from the trial date itself the more difficult it will be for a Respondent to prove deliberate absence to the criminal standard. I cannot accept that submission. There is, of course, a range of factual scenarios, but I do not think that it is uncommon for an individual to conceive the notion that he will not attend his trial in any circumstances shortly after he has been charged. Mr Perry advanced a series of submissions on *Bertino* which I will address in due course.

42. The reasons why the Supreme Court allowed Mr Bertino's appeal were as follows:

> "48. It was for the requesting judicial authority to prove to the criminal standard that the appellant had unequivocally waived his right to be present at his trial: see section 206 of the 2003 Act.
>
> 49. In this case, the appellant was under investigation. He had not been charged and, in fact, had never been arrested or questioned in connection with the alleged offending (with the attendant right to legal assistance) when he provided his details to the judicial police in July 2015. The decision to initiate criminal proceedings was made in June 2017. As the district judge himself recognised in his ruling, in July 2015 a prosecution was no more than a possibility. The appellant was never officially informed that he was being prosecuted nor was he notified of the time and place of his trial.
>
> 50. The appellant's dealings with the police both in Venice and Sicily fell a long way short of being provided by the authorities with an official "accusation". He knew that he was suspected of

> a crime and that it was being investigated. There was no certainty that a prosecution would follow. When the appellant left Italy without giving the judicial police a new address there were no criminal proceedings of which he could have been aware, still less was there a trial from which he was in a position deliberately to absent himself. In those circumstances we conclude that the District Judge and Swift J erred in reaching the conclusion that he had deliberately absented himself from his trial.
>
> 51. His conduct was far removed from the sort envisaged by the Strasbourg Court in *Sejdovic* at para 99 or the Luxembourg Cout in *IR* at para 48 (see paras 38 and 39 above) which might justify a contrary conclusion. That is sufficient to dispose of this appeal."

43. At para 99 of *Sejdovic v Italy* (Application No 56581/00, unreported) the Strasbourg Court said this:

> "The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest ... or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces."

44. Further, the Supreme Court emphasised that a "general manifest lack of diligence" would not suffice (para 55). The standard imposed by the Strasbourg Court for proof to the criminal standard of waiver of rights was:

> "… for a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour." (para 54)

45. The failure to notify the Italian authorities of the change of address amounted to a lack of due diligence. Taken in isolation, it was not sufficient to lead to a conclusion of deliberate absence. This was because Mr Bertino had not been charged with a criminal offence and whilst he was a suspect had done nothing which might permit the inference to be drawn that he was evading the criminal process. The Supreme Court did not address the hypothetical question of whether Mr Bertino would or might have been deliberately absent if he had been charged and then, once in this country, failed to notify the Italian authorities of his change of address. Nor did the Supreme Court address the issue of deliberate absence on the hypothesis that, instead of doing nothing, Mr Bertino whilst in this country and still a suspect, was contacted by the Italian authorities and actively misled them with the intention of evading future prosecution.

46. Finally, at para 58 the Supreme Court addressed the certified question posed to it in more general terms:

> "58. The certified question on this issue poses a choice in black and white terms:
>
> "For a requested person to have deliberately absented himself from trial for the purpose of section 20(3) of the Extradition Act 2003, must the requesting authority prove that he had actual knowledge that he could be convicted and sentenced in absentia?"
>
> The Strasbourg Court has been careful not to present the issue in such stark terms although ordinarily it would be expected that the requesting authority must prove that the requested person had actual knowledge that he could be convicted and sentenced in absentia. As we have already indicted, in *Sejdovic* at para 99 (see para 38 above), on which Miss Malcolm KC relied, the court was careful to leave open the precise boundaries of behaviour that would support a conclusion that the right to be present at trial had been unequivocally waived. The cases we have cited provide many examples where the Strasbourg Court has decided that a particular indicator does not itself support that conclusion. But behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence. It may be that the key to the question is in the examples given in *Sejdovic* at para 99. The court recognised the possibility that the facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. Examples given were where the accused states publicly or in writing an intention not to respond to summonses of which he has become aware; or succeeds in evading an attempted arrest; or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces. This points towards circumstances which demonstrate that when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option. But such considerations do not arise in this appeal, where the facts are far removed from unequivocal waiver in a knowing and intelligent way."

47. Counsel subjected this paragraph to close analysis. It is common ground that Mr Mohammed and Mr Oprea were not warned, contrary to the practice in our courts, that a trial might proceed in their absence. All the possible factual scenarios in which a Respondent is able to prove to the necessary constituents of deliberate absence cannot

be presaged although a clear steer is given by para 99 of the judgment of the ECtHR in *Sedjovic*. What is required is (1) a knowing and intelligent awareness of the criminal proceedings and the charges being faced, and (2) an unequivocal intention (usually proved inferentially) not to participate in a trial or to escape prosecution. In extradition cases the accused person will by definition have placed himself beyond the jurisdiction of the prosecution authorities, and that by itself is insufficient to prove deliberate absence. However, once these two limbs of the para 58 test is fulfilled, the Court is then permitted as a matter of inference to conclude that the accused also knew or appreciated that for all practical purposes a trial with him present would not be practical, or that a trial *in absentia* would be the only practical option. In reality, unless a prosecuting authority decides no longer to proceed at all, a trial in the accused's absence *will be* the only practical option. I cannot accept Mr Perry's submission that the only correct course would be to issue an accusation warrant.

48. I do not lose sight of the consideration that a conclusion adverse to an accused requires extreme rather than run-of-the mill facts. This is all in the context of what Lord Bingham of Cornhill said at para 28 of his opinion in *Jones*, referring to Strasbourg authority, of the "capital importance" of the right to be present at one's trial.

49. In his recent decision in *Maciuca v District Court of Bacau, Romania* [2025] EWHC 766 (Admin), Eyre J applied *Bertino* to the circumstances of another Romanian case. Each case turns on its own facts and *Maciuca* was a clearer case from Romania's perspective than, for example, Mr Mohammed's. Mr Maciuca left Romania in the knowledge that there were criminal charges against him (para 60), and he had provided a false address to the Romanian police and failed to inform the authorities of his contact address in the UK (para 64). Eyre J held that those matters were sufficient to justify a finding by a district judge that the appellant was deliberately absent. With respect, I agree with Eyre J's observations about the need to proceed with considerable caution in circumstances where waiver can only arise as a matter of inference (para 54), the difference between the concepts of fugitive status and deliberate absence (para 58), and the approach to the penultimate sentence of para 58 of Bertino (para 55) which I have set out above in my own way.

DELIBERATE ABSENCE: APPLICATION OF THESE PRINCIPLES TO THE CASES UNDER APPEAL

Mr Mohammed

50. Mr Watson submitted in writing that the Arrest Warrant proceeds on the footing that Mr Mohammed did not deliberately absent himself from his trial, and there is no basis for looking behind it or considering the recent Further Information to supplement it. He did not press that submission orally. In my view, the Arrest Warrant was not directed to the issue of deliberate absence under our domestic law. In any event, for reasons which I will explain in due course, the recent Further Information and fresh evidence is admissible in these circumstances.

51. Mr Watson's primary submission, which he developed forcefully in oral argument in response to persistent questioning from the Court, was that the most that can be said against Mr Mohammed is that he acted with a lack of due diligence. There is no or

insufficient evidence that Mr Mohammed unequivocally waived his rights with the requisite accompanying mental element: i.e. that he was knowing and intelligent, and appreciated the consequences of his behaviour. I will address the specific arguments he raised during the course of my analysis of the evidence.

52. In my judgment, the point of departure for a correct analysis of this case is to recall that the s. 20 issue was not raised by Mr Mohammed before the District Judge. Accordingly, section 27, sub-sections (2) and (4) of the 2003 Act apply:

> "(2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> ...
>
> (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;"

53. As the issue was not raised below, I consider that (1) Romania is entitled to adduce further evidence to address it (as it has done) and (2) the principles laid down by this Court (Sir Anthony May P. and Silber J) in *The Szombathely City Court and others v Fenyvesi* [2009] EWHC 231 (Admin) apply. I do not accept that the approach followed by this Court in *Hoholm v Government of Norway* [2009] EWHC 1513 (Admin) is applicable, because that was a case which turned on a pure point of law. In short, this Court should only allow an appeal on the basis of an issue not raised below if on all the evidence it is in a position to assess that the new issue is "decisive".

54. Mr Smith fairly conceded that the new issue is capable of being decisive and that we should therefore consider it. In light of our concerns about the difficulties that would arise in a case where Mr Mohammed had not been cross-examined before the District Judge on the issue of deliberate absence, towards the end of the first day of the hearing my Lord raised the possibility of Mr Mohammed giving oral evidence before us which could then be tested. Mr Smith favoured that proposal; Mr Watson did not. At the conclusion of proceedings on the first day, we ruled that there should not be an adjournment and that Mr Mohammed should be given the opportunity to testify, if so advised, at 2pm the following day.

55. At 2pm on the second day of the hearing Mr Watson invited us to reconsider that ruling. His primary submission was that in the circumstances of this case Mr Mohammed should not give evidence. It was not Mr Mohammed's fault that he found himself in this position, and Mr Smith had made no such application in advance of the hearing. In the alternative, he advanced various submissions in support of the proposition that it would be unfair to put Mr Mohammed to his election without giving him a proper opportunity to take stock, ascertain whether relevant documents were available etc.

56. In the face of these arguments, the Court acceded to Mr Watson's primary submission, and also indicated that no adverse inference would be drawn from Mr Mohammed not giving evidence. The circumstances of this case are unusual and our ruling was not intended to lay down a general principle. It follows that the Court will have to do the best it can on the available evidence, drawing inferences where appropriate.

57. In my judgment, it is clear that on 3 December 2018 Mr Mohammed was informed in English of his obligations under Article 108 of the Criminal Code. The fact that he was asked to provide his home address could only have been in the context of that provision and he must have appreciated the purpose of the request. He was then given a choice: either be held in custody for 2 weeks pending further investigations, or be given conditional bail for 2 months on the same premise. At the conclusion of the 2 month period, the couple's passports were returned and Mr Mohammed and Ms Suneechur were permitted to leave Romania. I cannot begin to accept their evidence that they were told that the matter was concluded or "done" and/or that the 2 month period somehow represented a sentence predicated on a finding of guilt. The District Judge came to the same view as regards Mr Mohammed but not Ms Suneechur (in respect of whom he expressed no conclusion either way). Further, I accept Mr Smith's submission that the evidence before this Court is more complete. It follows that Mr Mohammed must have known that the matter had not gone away and that Romania would likely be seeking to contact him in the UK. As he said in his proof of evidence, he just wanted to forget about it.

58. I have pondered long and hard on this issue, not least because the adverse finding I have made has obvious repercussions for Mr Mohammed's credibility more generally. However, I see the force of Mr Watson's submission that the Article 108 warning, which on any view did not cover the possibility of a trial proceeding *in absentia*, does not appear to have been repeated to Mr Mohammed on or shortly before his departure from Romania. That warning was given to Ms Suneechur on 28 January 2019 when she was formally interviewed, but in my judgment it is a step too far, in the context of the criminal standard of proof, to conclude that Mr Mohammed was aware of it. I am not ignoring the fact that in her evidence before the District Judge Ms Suneechur stated that she was interviewed on the same date as her husband (i.e. on 3 December 2018) and that her evidence below does not address the possibility that she was interviewed on 28 January 2019, whether for the first or the second time; but the court file gives only the latter date. An additional complicating factor is that it would make obvious sense for Romania to reiterate an accused's obligations under Article 108 at the time he is about to leave the country. Even so, I cannot proceed on the basis that Romania did so: the available information (*pace* one submission made by Mr Smith to the effect that Mr Mohammed was re-interviewed on 28 January) does not indicate that this happened.

59. The inferences to be drawn as to Mr Mohammed's state of mind at the time he left Romania are different from those that arose in Mr Maciuca's case where a false address was given. Mr Mohammed had, it seems, provided his correct home address in the UK. Furthermore, it is unclear when he and his wife left that address or what his state of mind was at that point.

60. In order to conclude that Mr Mohammed was deliberately absent from his trial, it would be necessary to draw the inference that when he changed address his failure to notify Romania indicated an intention to evade prosecution rather than a lack of diligence or oversight. The previous history, including my adverse credibility finding, remains

relevant but it is not determinative. Not without some hesitation, I have reached the conclusion that this inference cannot be drawn to the criminal standard.

61. It follows that Mr Mohammed's s. 20(3) ground succeeds, and that is sufficient for his purposes for his appeal to be allowed.

Mr Oprea

62. Mr Perry's submissions were, as ever, erudite, helpful and realistic.

63. Mr Perry placed considerable reliance on the fact that the jurisprudence of the ECtHR which formed the basis of the Supreme Court's decision in *Bertino* was in its turn influenced by Lord Rodger's dissenting opinion in *R v Jones* [2003] 1 AC 1, a case which went before the Strasbourg Court as *Jones v UK* [2003] 37 EHRR CD269. However, I do not consider that Lord Rodger's opinion should bear that weight, not least because the cultural context was very different a generation ago.

64. Mr Perry was critical of the District Judge's reasoning, in particular what he submitted to be key omissions. For example, he contended that it was highly relevant that Mr Oprea was tried in his absence after he had been discharged on the accusation warrant relating to the same offending. Mr Perry submitted that the critical date for these purposes was either the June or September 2017 date I have previously mentioned. It follows, he argued, either that everything that took place before then was irrelevant, or that the District Judge was wrong to draw the inference that Mr Oprea possessed the requisite degree of intention and/or apprehended that a trial in his absence was the only option.

65. Mr Smith contended that the correct starting point for a consideration of Mr Oprea's conduct and the inferences to be drawn from it is the January 2015 date when Mr Oprea was formally charged. He submitted that the District Judge was entitled to conclude on all the evidence that Mr Oprea had evinced an intention to evade prosecution and not to attend any trial, come what may.

66. The issue for us is whether the decision of the District Judge was wrong on this issue: see the decision of this Court (Lord Thomas CJ, Ryder LJ and Ouseley J) in *Polish Judicial Authorities v Celinski* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551, at para 24 in particular.

67. The District Judge referred in terms to para 58 of *Bertino*. He correctly understood that this was not a case where Romania could prove that Mr Oprea was warned that his trial might proceed in his absence. The District Judge concluded that Mr Oprea was not an honest witness, and in my view that was hardly a surprising finding. This was, frankly, an egregious case of a man seeking to play the system for as long as he could get away with it, harbouring at all material times no intention of attending his trial in Romania whenever that may happen to be. There was a plethora of bench warrants and several telephone calls, the existence of which Mr Oprea denied. In the circumstances of this case, which clearly do meet the threshold of extreme conduct, the entirety of his conduct after January 2015 is relevant even if, contrary to Mr Smith's submissions and my finding, Mr Oprea was not in fact charged until 2017. Furthermore, I cannot accept Mr

Perry's submission that the failure of the accusation warrant is relevant to Mr Oprea's intention. That was not a point that was taken below, and in any event I consider that it is no more than neutral.

68. There is some force in the contention that the District Judge's reasons were relatively brief and that he did not cover the whole evidential terrain. However, the issue for us on this appeal is not whether Mr Oprea might have a reasons challenge but whether the outcome was wrong. In my judgment, the District Judge's core conclusions were fair and reasonable in all the circumstances, and I would therefore reject Mr Oprea's submissions on the s. 20 issue.

MR MOHAMMED'S OTHER GROUNDS

69. In light of my conclusion on the deliberate absence issue, it is unnecessary to address Mr Mohammed's argument based on oppression/passage of time. It suffices to say that, had I reached a different conclusion on Mr Mohammed's principal ground, I would not have upheld his s. 14 argument.

70. In the circumstances that have arisen, I will deal quite briefly with Mr Mohammed's other grounds.

Article 3: Prison Conditions

71. The District Judge set out in some detail the familiar case law on Article 3 in the context of prison conditions. Romania has lost the benefit of the presumption of ECHR compliance in relation to its prison estate. Romania gave an assurance issued by the National Administration of Penitentiaries ("the NPA") on 24 May 2023 that Mr Mohammed would be guaranteed at least 3 square metres of personal space excluding toilet facilities. After the standard initial period of 21 days "in quarantine" at Bucureşti-Rahova, he will likely serve his sentence in Bucureşti-Jilava prison, in the first instance in the semi-open regime. Further, after serving one-fifth of his sentence he may be transferred to the open regime at the same institution where conditions are less restrictive.

72. The District Judge said that there was "little value or weight" to be accorded to the report of Mr George Tugushi filed on behalf of Mr Mohammed. This was because Mr Tugushi had not visited any prison within the Romanian prison estate and was reliant on no more than open source material. Further, as the District Judge put it, he was not an expert in Romanian prisons having no direct experience of them and not having inspected them for the purpose of this case: see *Brazuks v Latvia* [2014] EWHC 1021 (Admin).

73. The District Judge, having stated in terms that the presumption did not apply, gave the following reasons for rejecting Mr Mohammed's Article 3 challenge:

> "100. Having considered all the evidence received in this case (including the limited assistance from Dr Tugushi) I am satisfied

> that there is no reason to doubt the assurance provided in the present case.
>
> 101. I also note that the contents of the 2021 CPT report were considered by the Divisional Court in the case of *Marinescu v Romania* [2022] EWHC 2317 (Admin) and it would be unnecessary – indeed inappropriate – for this Court to consider the issues that have been adjudicated upon by the High Court and which are binding on Judges of this Court."

74. Mr Watson advanced three submissions in support of his Article 3 ground. First, he argued that the District Judge adopted "too stringent" an approach to the issues given that the presumption does not apply and the assurance was provided by a non-judicial authority. Secondly, he submitted that the District Judge erred in principle in dismissing Mr Tugushi's report in the way in which he did, particularly in circumstances where Mr Mohammed's representatives had obtained prior authority for Mr Tugushi to inspect the relevant prison and the lower Court had directed the CPS to communicate that request to Romania. There had been no subsequent communication from the CPS. Thirdly, he argued that the District Judge was wrong to place uncritical reliance on the assurance having regard to Mr Tugushi's report and other objective evidence bearing on material conditions in Romanian prisons generally. For example, there was evidence of overcrowding, seriously deficient material conditions, widespread violence and a severe shortage of medical and psychiatric staff. At the time of Mr Tugishi's report, Bucuresti-Jilava had an occupancy rate of 138.5%.

75. The leading recent cases in this Court on Romanian prison conditions are *Marinescu and others v Judecatoria Neamt, Romania* [2022] EWHC 2317 (Admin) (Holroyde LJ and Saini J) and *Gurău v Suceava District Court, Romania* [2024] EWHC 1924 (Admin) (Holroyde LJ and Jay J). *Gurău* was not available to the District Judge but it did no more than summarise *Marinescu*. Only a brief encapsulation of the operative principles is required because this Court is extremely familiar with them and they are not in dispute:

(1) whether an assurance is sufficient will depend on the facts and circumstances of the case. The important question is whether the assurance would, in its practical application, provide sufficient guarantee that the person concerned will be protected from ill-treatment (*Marinescu*, paras 24-25).

(2) the ECtHR in *Othman v UK* [2012] 55 EHRR 1 set out a non-exhaustive list of factors which may be used to measure the effectiveness of assurances (*Marinescu*, paras 21, 26-28).

(3) whilst issues concerning overcrowding and material conditions in the Romanian prison estate remain, "Romania has clearly made efforts to tackle the systemic problems to which the ECtHR had referred" (*Marinescu*, para 50).

(4) there is nothing to indicate that Romania would not honour its undertaking it has given in relation to personal space (*Gurău*, para 64).

(5) the evidence falls short of establishing (in relation to prisons which are not in fact the subject of the present assurance) a real risk of a violation of Article 3 in relation

to material conditions such as hot water and heating, healthcare and inter-prisoner violence (*Gurău*, paras 66-69).

76. I see no force in Mr Watson's first submission. The District Judge directed himself accurately on the relevant case law and the principles to be derived from it, and was well aware that Romania had lost the benefit of the presumption – hence the need to consider the reliability of the assurances given. Further, the assurance given in this case was by the same individual who had provided it in *Marinescu*.

77. As for Mr Watson's second argument, Mr Tugushi has given expert evidence in other cases of which the members of this Court are variously aware although these did not involve Romania. Mr Watson mentioned *Ciorici and others v Government of Moldova* [2024] EWHC 809 (Admin), where this Court (Coulson LJ and Jay J) had the following to say about Mr Tugushi's evidence in that case (he had visited the prisons in issue):

> "Mr George Tugushi provided a number of reports which were before the District Judge and gave oral evidence remotely. He has been a member of the CPT since 2005 and has a distinguished *cv*. Mr Evans did not seek to impugn his credibility or reliability as an expert witness. His reports are extremely thorough and appear to us to be balanced." (para 31)

78. On 24 October 2023 the CPS explained to Mr Mohammed's solicitor that "my understanding is that [Romania] will refuse to allow your expert to inspect the Romania prison estate due to Romanian law". Mr Watson did not seek to question this understanding. In my view, Mr Smith was right to submit that, given his lack of direct experience of Romanian prisons and law, Mr Tugushi could do no more than comment on the open source material. It may have contained a convincing analysis of that material, but it did not constitute independent evidence in its own right. I do not read the District Judge's decision as amounting to a conclusion that the open source material should itself be given little weight because it has been mediated through Mr Tugushi.

79. Mr Watson's third submission was based on the contents of Mr Tugushi's report and/or the underlying open source material, including in particular CPT reports, to which Mr Tugushi referred. This submission was, in reality, a reprise of the arguments this Court has previously considered and ruled on in connection with overcrowding, material conditions, staff shortages and inter-prisoner violence across the Romanian prison estate. The only piece of additional information Mr Tugushi adds is that according to official data published by the NPA on 17 October 2023, Bucureşti-Jilava prison has 725 places which were being occupied by 1,004 inmates (this supports the 138.5% overcrowding figure to which I have already alluded, although it is based on the premise of 4 square metres per inmate rather than 3). The remainder of Mr Tugushi's report does not address this particular institution.

80. I deal with just two of the specific points that Mr Watson advanced. First, he made limited criticisms of the regime at Bucureşti-Rahova prison based on the 2021 CPT report. However, the assurance in the present case is the same as those given in *Marinescu* and *Gurău* where this Court held that they were adequate. Secondly, Mr Watson submitted that a bland, generic assurance dealing with healthcare was insufficient to deal with Mr Mohammed's PTSD and depression. According to Dr Paula Rothermel's report dated 11 October 2023, Mr Mohammed at that stage met the

diagnostic criteria for PTSD although he was not receiving treatment. Dr Rothermel's opinion was that extradition to Romania would result in a significant deterioration in his mental health. Before the District Judge Mr Mohammed's mental health was not raised in the context of Article 3. Romania's assurance, although somewhat generic, indicates that psychiatric and/or psychological treatments would be available. Moreover, there is force in Mr Smith's submission that the context is relevant both here and more generally, namely of incarceration in semi-open and then open conditions. Overall, I am unable to conclude that the District Judge's decision was wrong on this aspect of the case.

81. The District Judge's reasons on Article 3 were somewhat brief. I have therefore examined all the available evidence albeit in the context of being part of a constitution of this Court which has performed a similar exercise last year. This, combined with the fact that Mr Mohammed's appeal is being allowed on another ground, has meant that a lengthy judgment on the Article 3 issue has not been required.

82. Overall, in my judgment the District Judge was correct to conclude that there is no reason to doubt the assurance given in this case. It follows that Mr Mohammed's Article 3 challenge must fail.

Article 8

83. Permission was refused on the papers by Hill J on 24 May 2024. Renewal grounds were lodged and the hearing was listed before me on 24 September 2024. No one attended on that occasion and so I refused the renewed application. On 22 January 2025 Mr Mohammed applied to re-open the Article 8 ground. It was submitted in writing that there had been an email from the Court listing the oral renewal but this had been overlooked. The Court had sent an email on 10 July listing the oral renewal on 24 September. It appears that Mr Mohammed's solicitor either did not read the email or diarise its contents. The application to re-open was not made until January this year.

84. The power to re-open a decision of the High Court in these circumstances is set out in CPR r. 50.27 which provides:

> "Re-opening the determination of an appeal
>
> 50.27. (1) This rule applies where a party wants the High Court to re-open a decision of that court which determines an appeal or an application for permission to appeal.
>
> (2) Such a party must –
>
> (a) apply in writing for permission to re-open that decision, as soon as practicable after becoming aware of the grounds for ding so, and
>
> (b) serve the application on the High Court and every other party.
>
> (3) The application must –

> (a) specify the decision which the applicant wants the court to re-open;
>
> (b) give reasons why -
>
> (i) it is necessary for the court to re-open that decision in order to avoid real injustice,
>
> (ii) the circumstances are exceptional and make it appropriate to re-open the decision, and
>
> (iii) there is no alternative effective remedy.
>
> (4) The court must not give permission to re-open a decision unless each other party has had an opportunity to make representations."

85. In *Rexha v Serious Organised Crime Agency* [2012] EWHC 3397 (Admin), Ouseley J stated that the jurisdiction to re-open was only to be exercised "very sparingly and … in cases which truly warrant it". A similar point was made by Burnett LJ (as he then was) sitting in this Court in *USA v Bowen* [2015] EWHC 1873 (Admin).

86. Mr Watson relied on his skeleton argument. He submitted that this is an exceptional case where the Court should re-open my decision refusing permission to appeal in the interests of justice. Mr Watson relied on the further delay that has accrued since the refusal of permission, the development and strength of the relationship between father and son, the possibility that the period of remand on conditional bail will be deducted from the sentence to be served if he is surrendered, Mr Mohammed's eligibility for discretionary early release after serving two-thirds of a custodial sentence, and the relative lack of gravity of the index offence.

87. I tend to agree with Mr David Ball (whose submissions were succinct, clear and helpful) that Mr Mohammed cannot bring his case within the terms of r. 50.27. However, I have considered the merits of his Article 8 case in light of all Mr Watson's submissions and the careful balancing exercise conducted by the District Judge. The latter considered all relevant factors placed before him and in my view came to a conclusion that he was fully entitled to reach. In particular, the District Judge considered the seriousness of the index offence and Mr Mohammed's role in it, as well as the expert evidence relating to his own mental health and the position of his young son. Further, the District Judge expressly addressed the fact that Mr Mohammed has been on conditional bail in this country for an extended period.

88. The District Judge did not deal in terms with the consideration that Mr Mohammed would be eligible for discretionary early release after serving two-thirds of a custodial sentence. That issue has very recently been considered by the Supreme Court, Lords Lloyd-Jones and Stephens JJSC giving the joint judgment of the Court, in *Andrysiewicz v Circuit Court in Lodz, Poland* [2025] UKSC 23. In short, the bare possibility of early release in a case such as the present should be considered but only in rare cases would the Court be in a position to make any useful prediction as to the likelihood of the outcome of any such application being made in Romania in due course. That is dispositive of the point but in my judgment, even if Mr Mohammed should have a good

chance of being released at the two-thirds point, it is very difficult to see what difference that might make to the Article 8 balance. Mr Watson, having drawn *Andrysiewicz* to our attention, did not press this point in oral argument.

89. It should also be noted that at para 43 of its judgment in *Andrysiewicz* the Supreme Court added this:

> "43. We have set out above relevant passages in Norris, H(H) and Celinski at some length because it is clear that there is a need to reiterate the essential points they make. Cases in which a submission founded on article 8 ECHR may defeat the public interest in extradition will be rare. It is most unlikely that extradition will be held to be disproportionate on the ground of interference with private life. Even in cases where interference with family life is relied upon, it will only be in cases of exceptionally severe impact on family life that an article 8 ECHR "defence" will have any prospect of success."

90. For all these reasons, I would decline to re-open my decision to refuse permission to appeal on the Article 8 ground.

MR OPREA'S OTHER GROUND

Article 8

91. Mr Perry relies on the following considerations fully set out in his written argument. Mr Oprea is in regular employment; he has a wife and two young children in this country; his wife suffers from depression and her immediate family have moved to Canada; there have been significant delays in the extradition proceedings; the index offences are stale and nothing happened between 2018 and 2024; and, Mr Oprea has been subject to restrictive bail conditions including in particular an electronically monitored curfew since May 2024. As *Pabian v Poland* [2024] EWHC 2431 (Admin) makes clear, delay is salient in the following circumstances:

> "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." (per Chamberlain J)

92. In this regard, Mr Perry submitted that circumstances have changed since the date of the District Judge's decision. The birth of the second child and the family's move to Canada post-dated it. It follows, he contended, that the Court should conduct the balancing exercise for itself.

93. In my judgment, the correct approach is somewhat different. The first question to address is whether Mr Oprea can demonstrate that the balancing exercise carried out by the District Judge on the material available to him was wrong in the *Celinski* sense. If that burden of persuasion cannot be discharged the second question is whether the fresh evidence – in other words, the change in circumstances since the date of the District Judge's decision – is "decisive" in the *Fenyvesi* sense.

94. It is undoubtedly the case that extradition will bring considerable hardship to Mr Oprea's wife and young family. There are other factors militating against extradition which the District Judge enumerated. However, the District Judge found that Mr Oprea is a fugitive and that finding is not appealed. Mr Smith addresses the period of delay between 2018 and 2024 by observing that between those dates "it is not clear where the Appellant was". That submission is not particularly convincing inasmuch as it was known where Mr Oprea was between 2016 and 2018, he is unlikely to have travelled elsewhere, and any steps taken to attempt to find him in the UK have not been identified beyond asserting that "constant enquiries" were made with the Centre for International Police Co-Operation on the Status of EAW Enforcement. That having been said, any delay by a Respondent in circumstances where an Appellant is found to be a fugitive carries very little weight. Mr Oprea evaded justice and deliberately absented himself from his trial in circumstances which in my view, which the District Judge no doubt shared, were egregious. Furthermore, although now stale, this was serious offending carrying with it a strong public interest in favour of extradition. In my judgment, there is no basis for holding that the District Judge's decision was wrong, still less so in light of para 43 of the Supreme Court's decision in *Andrysiewicz*.

95. The compassionate circumstances of this case have moved slightly in Mr Oprea's favour since October 2024 but not significantly so. In my opinion, it cannot be said that the change of circumstances in a case such as this should be envisaged as being "decisive".

96. For all these reasons, Mr Oprea's Article 8 ground must be rejected.

DISPOSAL

97. If my Lord agrees, I would allow Mr Mohammed's appeal but only on his ground under s. 20(3) of the 2003 Act. It follows that he is discharged.

98. Mr Oprea's appeal fails.

LORD JUSTICE HOLROYDE:

99. I am very grateful to Mr Justice Jay for his clear and comprehensive judgment. I agree with his reasoning and conclusions, and therefore agree with him as to the disposal of these appeals. I wish only to add the following observations.

100. First, I agree with Mr Justice Jay's rejection (at [41] above) of the submission that the further away one is from a specific trial date, the harder it will be for a requesting state to prove deliberate absence. As time passes before a specific trial date is fixed, the requested person may of course act in ways which may be said to be inconsistent with an unequivocal waiver of his right to be present at his trial; and in that sense, it may become harder for the requesting state to discharge the burden of proof of deliberate absence to the criminal standard. But that is a different point. If the submission made in this case were correct, it would confer a wholly undeserved advantage on those who make an earlier, rather than a later, decision that they will in no circumstances attend a trial, wherever and whenever it may be, and will do all they can to avoid prosecution.

101. It follows that, if the evidence compels the inference that a requested person has "put [himself] beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with [him] present would not be possible" (*Bertino* at [58]), he cannot profit from the fact that he did so at an early stage.

102. Secondly, I endorse the principle stated by Mr Justice Jay at [53] above as to the approach to be taken by this court when an issue is raised which was not raised below.

103. Thirdly, at [54] to [56] above Mr Justice Jay has recorded the circumstances in which Mr Mohammed was given an opportunity to give oral evidence if he wished, but in the event did not do so. The point had arisen at a late stage, and I make no criticism of any of the parties. The consequence was, however, as Mr Justice Jay has noted: the court had to do the best it could on the available evidence. That was unsatisfactory, because none of the available evidence had specifically been addressed to a s. 20(3) point which had not then arisen, and there had been no cross-examination specifically directed to that point.

104. I therefore give the following guidance for future cases. In most cases, of course, no question arises of this court hearing oral evidence on an appeal in an extradition case. But if an issue is permissibly raised on appeal which had not been raised in the magistrates' court, it may – exceptionally – be necessary for the court to hear oral evidence specifically directed to that issue. The danger, otherwise, is that one or other party will be unfairly disadvantaged by the court being left to consider what inferences about the new issue can safely be drawn from evidence addressed to other issues.

105. The parties should therefore consider, on a fact-specific basis, whether in a particular case this court should be invited to receive fresh oral evidence specifically directed to the new issue. Early consideration of that question will enable the parties, and the court, to consider whether the existing evidence – untested by cross-examination on the specific point – provides a safe basis for a fair resolution of an issue which was not before the lower court when that evidence was given.

106. Lastly, I wish to add my own thanks to counsel for their submissions, all of which were of a high quality.