Neutral Citation Number: [2021] EWHC 1584 (Admin)

Case No: CO/2793/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2021

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE JAY

- -

Between:

GABRIEL AUREL POPOVICIU	**Appellant**
- and -	
CURTEA DE APEL BUCURESTI (ROMANIA)	**Respondent**

- -
- -

Edward Fitzgerald QC, Peter Caldwell and Graeme Hall (instructed by **Boutique Law LLP**) for the **Appellant**
Mark Summers QC and Daniel Sternberg (instructed by **Crown Prosecution Service, Extradition Unit**) for the **Respondent**

Hearing dates: 15-19 March, 2021

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JUDGMENT

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed not before 11 am Friday 11 June 2021.

Lord Justice Holroyde:

1. Gabriel Popoviciu ("the appellant") was convicted in Romania of two offences: accessory to aggravated abuse of power, and bribery. He was sentenced to a total of 7 years' imprisonment, less the 24 hours he had spent under arrest. The whole of his sentence remains to be served. On 3 August 2017, a European Arrest Warrant ("EAW") seeking the return of the appellant was issued by the Curtea de Apel in Bucharest ("the Bucharest Court of Appeal" or – in its capacity as the requesting judicial authority – "the respondent"). The appellant was arrested on 14 August 2017. On 12 July 2019, after a hearing in the Westminster Magistrates' Court on 10 days spread over a period of nearly 6 months, District Judge Zani ("the DJ") ordered the appellant's extradition. The appellant now appeals against that order.

2. Before the DJ, the appellant challenged his extradition on numerous grounds. The essence of his case was, and is, that his prosecution was politically motivated and wholly unfair, and that he faces risk of death, or detention in inhumane prison conditions, if returned to Romania.

3. In this appeal, the appellant has renewed the challenges he advanced before the DJ and has added further grounds in respect of which he seeks to rely on fresh evidence. As will be seen, the fresh evidence has become the focus of the submissions now made on his behalf.

4. I begin by summarising, as briefly as possible, the relevant facts and the course of proceedings in Romania. For convenience only, and meaning no disrespect, I shall for the most part refer to persons by their surnames only.

The criminal proceedings in Romania:

5. The events giving rise to the criminal charges date back to 2000 and cover a period of about eight years. The appellant was accused of conspiring with Alecu Ioan Nicolae 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 appellant 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 apartment blocks on it. In February 2005 a witness, Becali Gheorge, made complaints to the Public Prosecutor about the transfer, and requested the investigation of the appellant and Alecu. In 2006 he made statements against the appellant and others.

6. 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).

7. In February 2008 an HCCJ prosecutor declined to initiate a prosecution against the appellant in file 1481/2006. In July 2008, however, the DNA prosecutors with conduct of file 206/2006, one of whom was Prosecutor Nicolae Marin, 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 was authorised to take part in the DNA investigation of the appellant, file 206/2006. It was alleged at the trial that the appellant, with the assistance of others, bribed Motoc so that he would not properly perform his duty of investigating the appellant and Alecu.

9. The appellant 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 bribery. He was arrested on 24 March 2009 and remanded in custody overnight before being granted bail by the Bucharest Court of Appeal.

10. In June 2009 Becali declined to answer questions in relation to one aspect of the investigation of the appellant.

11. On 21 December 2012 the DNA issued an indictment against the appellant and others under case number 9577/2/2012.

12. The trial, in the Bucharest Court of Appeal, was heard by Judge Ion-Tudoran Corneliu-Bogdan ("Judge Tudoran"). There were eleven 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. There were many hearings, which took place over a period of about 19 months, and more than ninety witnesses were heard. The appellant was represented throughout, and was present at all or most of the hearings.

13. 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.

14. 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 appellant and Alecu were in cahoots, but he did not have any evidence of that.

15. 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[1]. Later in March 2016 Becali gave oral evidence at the appellant's trial. In April 2016 the DNA discontinued the prosecution against him for perjury.

16. After two postponements requested by the parties, so that further written submissions could be made, 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 believed to be 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

[1] See [5] above.

and that the appellant had been motivated by the pursuit of considerable profits. He found all the accused guilty of the offences with which they were charged, saying (at p408 of the translated judgment):

> "None of the defendants admitted to committing any criminal act or to have broken any legal disposition.
>
> All the upholdings and the defences made by their defendants are not supported by the probatory material existing in the cause's file. Although largely and exhaustively presented, within the written conclusions placed in the said file, they will remain at the stage of declarations and, therefore, they will not influence in any way the delivery of the judgment.
>
> The 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."

17. Judge Tudoran set out, briefly, his conclusions about the individual defendants. He found the appellant to have knowingly broken the law and to have been the person who initiated the crimes. He said (at page 413) that the appellant was –

> "… the person who had a determined role in the unfolding of the illegal actions which lead, in the end, to the acquiring of the property, a significant asset in the society's patrimony. All the actions were aimed at achieving this aim and obtaining some extraordinary profits, completely illegal. His actions are highly serious, given their consequences, through the deprivation of necessary resources of an important institution of higher education, which had as its main aim the creation of specialists necessary in an essential branch of the national economy. He acted with knowledge and intention, using his acquaintances, relations, connections, social position and even the fame of his father in order to achieve the illegal aim."

18. The appellant was sentenced to a total term of 9 years' imprisonment.

19. Related civil proceedings, under file no 4445/2016 ("the civil proceedings"), 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".

20. The appellant 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.

21. A warrant of arrest was issued against the appellant in order to enforce his sentence. On the following day, 3 August 2017, the EAW was issued by Judge Andras of the Bucharest Court of Appeal. It was subsequently certified in this country by the National Crime Agency.

22. Before coming to the extradition proceedings, which as I have said resulted in the DJ ordering extradition on 12 July 2019, I will complete the overlapping chronology of relevant events in Romania.

Legal proceedings in Romania after the unsuccessful appeal:

23. The appellant applied to re-open the HCCJ decision of 2 August 2017[2], on the basis of suggested bias on the part of Judge Arghir. He contended that when hearing a bail application in 2009 Judge Arghir had indicated a fixed view that the appellant was guilty. His application was dismissed by the HCCJ (Judges Macavei, Cobzariu and Ilie) on 17 November 2017, for reasons given on 26 January 2018.

24. On 8 June 2018 the same constitution of the HCCJ refused an application by the appellant to annul his conviction. Reasons for the decision were given on 23 October 2018.

25. In December 2018 Judge Tudoran conducted the civil trial which he had separated from the criminal proceedings in June 2016. On 28 December he held that damage had been caused, but did not give his reasons for that decision.

26. On 18 February 2019 the appellant, through his Romanian lawyer, made a criminal complaint against Judge Tudoran to the Section for the Investigation of Crimes in Justice ("the SIIJ/SIJCO" – hereafter, for convenience, "the SIIJ"). He alleged that Judge Tudoran had committed an offence of abuse of office by his conduct of, and decision in, the civil proceedings. This complaint became the subject of file number 521/2019.

27. In May 2019 the SIIJ began an investigation *in rem* into allegations of abuse of office and influence peddling made against Judge Tudoran by one Cezar Panait. This investigation proceeded under file number 1603/2019.

28. On 6 June 2019 Judge Tudoran requested judicial retirement with effect from 15 October 2019. In July 2019, the Superior Council of Magistracy ("SCM") recommended to the President of Romania that the request should be granted.

29. From about August 2019, some articles appeared in the Romanian press making references to Judge Tudoran's unexplained wealth and his son's activities.

30. 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. I shall nonetheless continue, for convenience, to refer to him as "Judge Tudoran".

[2] See [20] above.

31. On the same day, 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 influence peddling in connection with Panait's case.

32. In October 2019 Moraru wished to interview Judge Tudoran, but was unable to do so because Judge Tudoran was in a psychiatric hospital.

33. On 30 October 2019 the Bucharest Court of Appeal ruled that there was no certainty as to whether, or when, Judge Tudoran could provide reasons for his decision of 28 December 2018 in the civil proceedings[3]. The Governing Board of the Bucharest Court of Appeal considered that Judge Tudoran's decision was "struck by absolute nullity for non-reasoning". On 4 November 2019, however, a digital copy of Judge Tudoran's written reasons for that ruling was delivered to the Bucharest Court of Appeal by his son.

34. In December 2019 the Bucharest Court of Appeal rejected a further application by the appellant for judicial review of his conviction on the basis of fresh evidence relating to a witness Stoica Marius. On appeal to the HCCJ (Judges Matei, Dragomir and Ilie), the decision was confirmed in February 2020.

35. In February 2020 Dr Opris Liviu Ciprian, a physician, made allegations against Judge Tudoran which became the subject of an investigation by the SIIJ under file number 477/2020.

36. On 9 June 2020 Prosecutor Florea, on behalf of the SIIJ, began an *in rem* criminal investigation (file number 521/2019) against Judge Tudoran in respect of an allegation by the appellant that Judge Tudoran had committed an offence of abuse of office in his handling of the civil file proceedings.

37. On 12 June 2020 the HCCJ (Judges Burnel, Cirnaru and Encean) annulled Judge Tudoran's decision in the civil proceedings, and remitted the case to the Bucharest Court of Appeal for re-hearing.

38. On 1 July 2020 the appellant, through his Romanian lawyer, supplemented his criminal complaint to the SIIJ (file 521/2019) to include a complaint of wrongful conviction based on Judge Tudoran's decision in June 2016 to sever the civil proceedings. Florea extended her investigation to include that further complaint.

39. The appellant made a yet further application to the Bucharest Court of Appeal for judicial review of his conviction, this time based on issues relating to the ownership of Baneasa Farm and on medical evidence concerning Judge Tudoran's fitness to practise. The application was refused by the Bucharest Court of Appeal on 15 September 2020, a decision confirmed by the HCCJ on 3 November 2020.

40. On 18 December 2020 Florea began an *in personam* criminal investigation against Judge Tudoran (file 521/2019[4]). A month later, however, Marin (now the deputy chief of the SIIJ) annulled and closed that *in personam* investigation. The appellant

[3] See [25] above.
[4] See [36] above.

challenged Marin's action, but on 17 February 2021 the General Prosecutor of Romania dismissed that challenge.

41. It will be apparent, even from that very brief outline of the relevant facts and of the criminal proceedings in Romania, that this appeal has a long and complicated history. I turn to the extradition proceedings in this country.

The extradition proceedings:

42. The extradition hearing began in October 2018 and was completed in April 2019. The DJ gave a ruling as to admissibility of evidence, which was the subject of an unsuccessful application by the appellant to re-open the decision. The DJ heard oral evidence from a number of witnesses. The appellant was not one of them.

43. Romania is a category 1 territory for the purposes of the Extradition Act 2003 ("the Act"), and accordingly Part 1 of that Act applies. The appellant challenged his return to Romania under both the "purpose" and "prejudice" limbs of section 13 of the Act, which provides:

> " **13 Extraneous considerations**
>
> A person's extradition to a category 1 territory is barred by reason of extraneous considerations if (and only if) it appears that—
>
> (a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or
>
> (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions."

44. The appellant brought further challenges under the European Convention on Human Rights, relying on Articles 2, 3, 5 and 6:

> "**Article 2 – Right to life**
>
> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> …
>
> **Article 3 – Prohibition of torture**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

> …
>
> **Article 5 – Right to liberty and security**
>
> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court …
>
> …
>
> **Article 6 – Right to a fair trial**
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

45. The DJ's decisions on those challenges were as follows.

46. Section 13 of the Act: the DJ noted that there was no evidence as to the appellant's political views. The theory advanced on the appellant's behalf was that he had been targeted, as a wealthy businessman, so as to strip him of his assets. The DJ found that no sufficient credible evidence had been advanced to support the suggestion that the appellant had been investigated or prosecuted by reason of any political opinions he may have held or which may have been imputed to him. He rejected the submissions that the trial and/or convictions had been either politically motivated or improperly obtained. He therefore rejected the challenges under both limbs of this section.

47. Article 2: the DJ noted that the bar is set very high for such a challenge. There was no evidence to suggest that the appellant had been directly or indirectly threatened in any way either before, during or after his trial and the extradition process. Reference had been made to the deaths in custody of other high profile persons, but the DJ was not persuaded by the lay opinions of witnesses who had given evidence about those deaths. He accepted that the respondent was aware of its art.2 obligations and had complied with them. He concluded that the evidence fell a long way short of the level necessary for this challenge to succeed.

48. Article 3: the DJ discounted as incredible much of the evidence about prison conditions given by two extraditees who had been called as witnesses for the appellant. He attached very little weight to what those witnesses had said. He noted that another witness for the appellant, a former judge who was serving a prison sentence in Romania, had not made any complaint about his prison conditions. The submissions, comments and concerns expressed on behalf of the appellant did not persuade him that there was a real risk that the appellant would face art.3 breaches if returned. He took into account written assurances given by the respondent and was satisfied that the Romanian

authorities were well aware of, and would satisfactorily abide by, their art.3 obligations towards the appellant.

49. Articles 5 and 6: the DJ considered these challenges together. He noted that, so far as he was aware, there was no case in which a UK court had refused extradition to a Convention state on the ground of a challenge under Article 5 or 6. He was satisfied that Romania is aware of, and abides by, its Convention obligations. He recorded that the appellant, having exhausted his remedies in Romania, had made an application to the European Court, the outcome of which was awaited. He referred to the detailed submissions made to him to the effect that the independence of the judges involved in the appellant's trial and appeal had been seriously compromised, thereby violating the appellant's right to a fair trial, though no complaint had been made about Judge Andras, the judge who had issued the EAW.

50. The DJ then considered the submissions made to him about Judge Tudoran. The case for the appellant had been that the SRI (the Romanian domestic intelligence agency) may well have had some incriminating evidence about Judge Tudoran's son, and the DJ had been 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. He 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 appellant's witnesses had put forward an entirely different suggestion as to why Judge Tudoran was under pressure in relation to his son. The DJ made clear 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. 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 appellant who had alleged improper influence on the Romanian judiciary had not been convincing.

51. It had then been submitted that the appeal decision was flawed because the judges in the HCCJ were subject to similar pressures and had made a number of blatant errors. Judges Dascalu and Pistol were said to be known as "DNA judges". Judge Arghir was criticised on the basis that her ruling on the bail application in 2009[5] showed that she had formed an immovable view of the appellant's guilt, and she should therefore not have been allowed to hear his appeal to the HCCJ. The DJ found little merit in these criticisms. He stated that it was not in dispute that corruption within the Romanian legal system was rife during the communist dictatorship, and he bore in mind the evidence he had heard to the effect that a large number of Romanian judges had files on them prepared by the DNA. He concluded, however, that

> "520. … the reliable evidence presented by the defence is a far cry from being able to state assuredly that what remains is a system of judicial corruption and bias, with inappropriate and/or unlawful oversight by the SRI and the DNA.
>
> 521. Similarly I am not of the view that plausible evidence has been brought before this court to demonstrate that [the appellant]

[5] See [23] above.

> – at the time of his trial and appeal – battled against an unfair system meaning that he did not have a fair trial (or appeal)."

52. The DJ went on to note that there had been no suggestion of corruption on the part of any of the three judges of the HCCJ who had on 17 November 2017 refused the appellant's application to re-open his appeal. Nor had any criticism been made of the judges of the Romanian Constitutional Court, whose interventions and decisions in his view demonstrated its total impartiality.

53. The DJ concluded that he was not persuaded that the appellant's return would expose him to a real risk of breaches of either art.5 or art.6.

54. The DJ therefore concluded that, having "exhaustively scrutinised" all the evidence and the lengthy written and oral submissions, he was satisfied that there were no bars to the appellant's extradition. He accordingly ordered the appellant's return to Romania to serve his sentence.

55. On 27 November 2019 Saini J granted permission to appeal against the DJ's decision on eight grounds. He also granted applications by the appellant for permission to adduce additional evidence for the purposes of the appeal.

The appeal:

56. The appeal is brought pursuant to section 26 of the Act. This court's powers are set out in section 27:

> "(1) On an appeal under section 26 the High Court may—
>
> (a) allow the appeal;
>
> (b) dismiss the appeal.
>
> (2) The court may allow the appeal only if the conditions in subsection (3) or the conditions in subsection (4) are satisfied.
>
> (3) The conditions are that—
>
> (a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;
>
> (b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.
>
> (4) The conditions are that—
>
> (a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

> (b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;
>
> (c) if he had decided the question in that way, he would have been required to order the person's discharge.
>
> (5) If the court allows the appeal it must—
>
> (a) order the person's discharge;
>
> (b) quash the order for his extradition."

57. Following the grant of permission, the appellant has made seven further applications to adduce fresh evidence and has applied to amend his grounds of appeal to raise further matters. This court has heard much of the additional evidence *de bene esse*, and must decide whether all or any of it is admissible in accordance with the familiar principles in *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin), [2009] 4 All ER 324. For convenience, and without at this stage indicating any conclusion about admissibility, I will refer to all of this evidence as "the fresh evidence".

58. The grounds of appeal, as amended, assert the following:

i) Ground 1: significant errors in the DJ's approach to the evidence, infecting all challenges.

ii) Ground 2: significant errors of law infecting the challenges under section 13(a) and (b) of the Act, Articles 5 and 6 and abuse of process.

iii) Ground 3: abuse of process.

iv) Ground 4: wrong decisions as to sections 13(a) and 13(b) of the Act.

v) Ground 5: multiple errors of law and fact in relation to Articles 5 and 6 of the Convention.

vi) Ground 6: significant errors of law and fact in relation to Article 3 of the Convention.

vii) Ground 7: wrong decision as to Article 2.

59. In a note prepared for a case management conference in October 2020, the appellant's case was summarised as follows: the judiciary in Romania were not independent in high-profile cases at the material time; Judge Tudoran was subjected to pressure to convict and was not impartial; the appellant's unlawful conviction could not be cured by an appeal on points of law which was not a rehearing; and in any event, the judges of the HCCJ were either biased and/or subjected to pressure to uphold the conviction.

60. By the time of the appeal hearing, however, the shape and focus of the appellant's case had changed very substantially.

61. Before considering the submissions now advanced, it is convenient to summarise the fresh evidence which this court is asked to consider.

62. The appellant applied to call oral evidence from four witnesses: Ionut Veniamin Dojana (a lawyer who acts for Panait in the proceedings under file 1603/2019[6]), Mihai Ciorcan (an investigative journalist), Professor Bogdan Micu (the appellant's Romanian lawyer) and Dr Radu Chirita. The application was opposed by the respondent. Having considered the submissions, the court was persuaded, exceptionally, that Dojana should be permitted to give oral evidence and face cross-examination, but that the other three witnesses did not meet the test of exceptionality. In their cases, accordingly, the court held that the normal rule should apply and oral evidence should not be heard.

The fresh evidence:

63. The fresh evidence relates, broadly, to the following allegations made by the appellant:

i) Judge Tudoran had a long-standing relationship with Becali, who is said to have been the primary witness for the prosecution: oral evidence about this was given by Dojana;

ii) Judge Tudoran's conduct of the appellant's case is under investigation by the SIIJ under file 521/2019: an *in personam* investigation was commenced on the basis that there were reasonable grounds to suspect that Judge Tudoran convicted the appellant when he knew him to be innocent; and although that investigation was quashed by Marin, an *in rem* investigation continues.

iii) Marin, who originally indicted the appellant and therefore has an interest in upholding the conviction, intervened inappropriately in the work of the SIIJ by quashing the *in personam* investigation under file 521/2019;

iv) Marin has also initiated criminal investigations against four persons who have provided evidence supporting the appellant's case, namely Ciorcan, Micu and two court officials, Ms Pirlogea and Ms Melinte: this is said to be similar to his initiation, during the criminal proceedings against the appellant, of investigations against Becali and Stoica when they provided evidence which was unhelpful to the prosecution.

The written and oral evidence of Dojana:

64. Dojana has made two statements. In the first, he said that in the mid-1990s he worked as an in-house lawyer for a company owned by Florea Pirvu. He came to know Judge Tudoran because Judge Tudoran was "acting, de facto and unofficially" as a legal and business adviser to Pirvu. Over time, Dojana became friendly with Judge Tudoran's son and with Pirvu's younger brother Cornel Pirvu. He was given advice and instructions by Judge Tudoran as to the preparation of applications to be made in court proceedings on behalf of Pirvu's business interests, including proceedings which were to be heard by Judge Tudoran himself.

65. Dojana said that Judge Tudoran knew Becali before 2000. He witnessed meetings between Judge Tudoran, Becali and Pirvu at various locations, including "the judge's

[6] See [31] above.

special bar" in the administration building at a second-hand car market owned by Autovit SA ("Autovit"), one of Pirvu's companies. They took part in several unauthorised gambling sessions organised by Pirvu. At one meeting at "the judge's special bar", 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.

66. In his second statement, Dojana described an occasion in September or October 2013 when he saw a meeting of Judge Tudoran, Pirvu and Becali. This allegation of a meeting between judge and witness during the appellant's trial was, understandably, emphasised in written submissions on behalf of the appellant.

67. Dojana also said that the prosecutor in file 1603/2019 (Panait's criminal complaint[7]) was considering the relationship between Judge Tudoran, Becali and Pirvu. That relationship, said Dojana, had been confirmed by witnesses in file 1603/2019 including Dobrin Liviu and Dumitrescu Catalin. 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.

68. In his oral evidence, Dojana said that his statements were true, but he had made a mistake in his second statement: the meeting which he witnessed was in September or October 2012, not 2013. He gave an elaborate explanation of how he had come to make that mistake. He said the friendship between Becali and Judge Tudoran was essentially a business relationship. He produced 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. In cross-examination he agreed that he had not mentioned these companies in his witness statements but said he had felt "inspired" to obtain and bring the copy documents to this court. Dojana 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. He said that he had not acted illegally in his work on behalf of Pirvu, but accepted he could be criticised for not daring to denounce Judge Tudoran. He also said that he had not been involved in corruption, but his conduct later in his career had been "morally questionable" because he had been sent clients by Judge Tudoran.

69. Dojana said he had seen Judge Tudoran and Becali together on 4 or 5 social occasions, but he had been excluded from other meetings between them which took place in Pirvu's office on occasions between 2010 and 2012: he had seen them going into a room together and "we all knew they were there to gamble", but he had not actually witnessed any gambling. Gambling for money was illegal, and it was not permissible for a judge to gamble with a business associate.

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[7] See [27] above.

70. 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 €2 million or $US 2 million. 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.

71. Dojana acted as Panait's lawyer when Panait denounced Judge Tudoran, making allegations of conduct wholly incompatible with Judge Tudoran's judicial office. In cross-examination he said he felt able to do that, as the lawyer representing Panait, even though he would not have dared say anything against Judge Tudoran on his own account.

72. Dojana said that on 22 August 2019 he was at the offices of the SIIJ speaking to Moraru in relation to Panait's complaint, file 1603/2019. At that time, 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 Moraru. He suggested that Judge Tudoran had spoken to Marin, though he had not seen that happen.

73. Dojana said he was present when Dobrin and Dumitrescu made statements to Moraru. He said that they, and other witnesses in file 1603/2019, were in fear of Judge Tudoran. He recommended to them that they could make statements and have them notarised, but said he only found out after the event that they had all done so. He was later provided with copies of the statements which Dobrin, Dumitrescu and a third witness Ungureanu Constantin had made, and provided these to a journalist, Ciorcan. He did that, he said, because the media should know "in case anything happened" to the witnesses.

74. As to how he came to be involved in this appeal, Dojana said that he had come to London in August 2020 to meet the appellant to discuss property development projects. He said that during the trial in Romania he had seen media reports about the prosecution of the appellant, but he did not know until about 2017 or 2018 that Judge Tudoran had been the trial judge. He did not know that Becali was the accuser. He said that in August 2020 he told the appellant that he thought he had been a victim of an agreement between Judge Tudoran, Becali and Pirvu and offered to help.

75. Dojana's evidence was that he had not previously made public his knowledge of Judge Tudoran because he feared Judge Tudoran could have intervened and ended his career. He went on to say that in 2021 he had learned for the first time that in 2013 Judge Tudoran's son had made a criminal complaint against him (Dojana) and Panait for tax evasion. There had been no basis for the allegation. Nonetheless, he said, he was not making his allegations against Judge Tudoran because he was angry at this false accusation: he just wanted justice to be done, because Judge Tudoran was a bad and unfair judge. He reiterated that Judge Tudoran and Becali had known each other for a long time.

Statements relied on as fresh evidence:

76. The appellant seeks to rely on statements dated 31 July 2020 by Dumitrescu, Dobrin and Ungureanu. These statements have been produced in this appeal by the journalist Ciorcan. They can be summarised 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.

78. Dobrin, an employee of Pirvu, alleged that Judge Tudoran had helped Pirvu in relation to the police investigation into the death of Pirvu's girlfriend. Pirvu was involved in usury and illegal gambling, and organised influence trafficking through Judge Tudoran. Pirvu had put his friend Becali in touch with Judge Tudoran in connection with Becali's acquisition of the Steaua club, and Judge Tudoran provided legal support to Becali, in that and other matters, for a fee.

79. Ungureanu, who was employed by Autovit, stated that construction and maintenance works at Judge Tudoran's home were regularly carried out by employees of Autovit.

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[8]). 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.

83. Ciorcan alleged that Judge Tudoran had a close and friendly relationship with Becali (and his family) dating back to at least the 1990s. He referred to various documents

[8] See [35] above.

which he produced, but did not assert any direct personal knowledge of any material fact. He alleged that Pirvu gave a red Mercedes car to Judge Tudoran.

84. Professor Radu Chirita, an academic and practising lawyer in Romania, was relied on as showing that at all material times judges in Romania were under enormous pressure from the DNA to convict those whom the DNA wishes to see convicted, and to uphold their convictions in the appellate court. Chirita quoted figures showing that in summer 2018 the DNA was investigating cases involving 474 judges and 346 prosecutors, and that over the preceding four and a half years it had investigated cases involving more than half the judges and prosecutors in Romania.

85. I do not think it necessary to refer to other statements and documents which were relied on by the appellant.

86. I turn to a brief summary of the lengthy submissions, written and oral, at the five-day hearing of this appeal. I do not think it necessary to mention all of the many points made, but I have considered all of them.

The submissions:

87. Before the DJ, the appellant placed emphasis on systemic problems in the Romanian criminal justice system, in particular alleging that judges were subject to improper pressure by the SRI and DNA. In this appeal, relying on *Adamescu v Romania* [2020] EWHC 2709 (Admin), he maintained his submission that during the period of the trial the justice system in Romania was beset by corruption and political interference, and that subsequent changes for the better cannot alter the position so far as the trial of this appellant is concerned. His emphasis now, however, is on the allegations that Judge Tudoran was generally corrupt and had an improper and undisclosed relationship with Becali, the complainant in the case. To a lesser extent, the appellant also relied on alleged bias on the part of Marin.

88. In his oral submissions, Mr Fitzgerald QC concentrated on grounds 3, 5 and 6. He did not make detailed oral submissions about Ground 1, which he realistically acknowledged was largely a matter of impression for the court. In relation to Ground 2, he relied on the written submissions as to various alleged errors of law. As to Ground 4, he did not abandon the allegation of a breach of section 13(a) of the Act, but said that it was encompassed within Ground 3.

89. In relation to Ground 3, Mr Fitzgerald submitted that it was an abuse of the process for the respondent to pursue this extradition request when it has become apparent that the trial judge was neither impartial nor independent. He argued that the fact that the respondent was still pursuing the request is a further indication that the prosecution of the appellant was and is improperly motivated.

90. He identified Ground 5 as the key ground, based on the flagrant denial of justice which it is said the appellant has suffered and will suffer if returned.

91. Ground 6, in respect of which Mr Caldwell made the oral submissions, related to the conditions which it is said the appellant will face in prison in Romania.

Ground 1:

92. The written submissions set out numerous criticisms of the DJ's approach to, and findings on, the evidence which he heard. They did so at great length and at times, I regret to say, in inappropriate terms. In essence, it was contended on behalf of the appellant that the DJ wholly failed to consider the evidence properly and demonstrated an impermissibly partial approach. It was submitted that the DJ adopted an atomistic approach (which was explained as meaning that he looked at the evidence of each witness in isolation from all the other evidence); "entirely overlooked" evidence of systemic failures by the Romanian criminal justice system to comply with fair trial rights, and of the abusive and manipulative practices of the DNA and the SRI; failed to mention or analyse important documentary evidence; and adopted superficial reasoning. These serious shortcomings, it was submitted, fatally undermined his conclusions.

93. Mr Summers QC, for the respondent, submitted that the challenges to the DJ's assessment of the evidence had largely not been pursued at the appeal hearing, and those that were gave no basis for going behind the DJ's decisions not to accept the evidence of the appellant's witnesses. He submitted that the experienced DJ plainly did recognise that the evidence of one witness may support that of another, but that the failure of the appellant to give evidence restricted the extent to which any such mutual support could be found. He further submitted that the DJ carefully analysed the evidence, which was in important respects contradictory, rightly stood back to evaluate its effect and made findings which he was clearly entitled to make.

Ground 2:

94. The written submissions for the appellant contended that the DJ erred in excluding expert evidence as to judicial independence (or lack of it) in Romania on the basis that it was hearsay; in excluding expert evidence as to the trial process, a decision which is said to be based on a misunderstanding of *Symeou v Greece* [2009] 1 WLR 2384; in excluding evidence from the appellant's trial lawyers; and in concluding that the appeal proceedings before the HCCJ cured any defects at first instance.

95. In relation to the first of those points, the appellant relied on *R (B) v Westminster Magistrates' Court* [2014] UKSC 59, [2015] AC 1195. In that case, it was common ground between the parties that in extradition proceedings, the normal rules of evidence are relaxed on issues relating to extraneous considerations, human rights and abuse of process. At [23], Lord Mance JSC (with whom Lord Neuberger PSC and Lord Reed JSC agreed) accepted that in relation to such matters,

> "… a broad approach is taken to the nature and basis of the expert evidence that is admissible."

96. The appellant had relied before the DJ on evidence of three witnesses who were put forward as experts, namely David Clark, Patrick Basham and Nicholas Kochan. He submitted to this court that the DJ in effect treated the fact that each of those witnesses relied on hearsay evidence as determinative of their unreliability. That, he contended, was an incorrect approach.

97. Mr Summers in response submitted that the witnesses concerned were not true experts. The DJ had been generous to the appellant in hearing the evidence and had rightly concluded that he could give it only limited weight because it was based on hearsay. *R*

(B) v Westminster Magistrates' Court permits experts to refer to authoritative reports, but does not extend to an "expert" who merely recounts a conversation with an unidentified source.

98. As to the second point, it was submitted that evidence as to the fairness of the trial process, and as to the correctness of Judge Tudoran's rulings and the merits of his decision, was relevant and probative on a central issue, namely the *bona fides* of the extradition request, and should not have been excluded. It was suggested that the DJ fell into error at the prompting of the respondent, which incorrectly cited *Symeou* at [35]-[37] as authority for the proposition that it was not for the DJ to determine whether any abuse had been committed during the trial process, that being a matter exclusively for the courts of the requesting state. The appellant submitted that *Symeou* was only authority for the limited proposition that in an accusation warrant case, allegations of police misconduct in the investigation of a crime are to be determined by the judiciary of the requesting state: see [34].

99. Mr Summers maintained his submission that *Symeou* clearly prohibited a requested person from using the extradition proceedings to relitigate the issues at his trial, and that accordingly the DJ's rulings were correct. He submitted that the appellant should not be allowed to use a complaint of abuse of process as a route by which to introduce evidence which would otherwise be excluded. He relied on *Symeou* at [35]-[36], where the Divisional Court explained the respective functions of the requested and requesting state in the EAW framework:

> "35. … The former are entitled to ensure that their duties and the functions under the Extradition Act 2003 Part I are not being abused. It is the exclusive function of the latter to try the issues relevant to the guilt or otherwise of the individual. This necessarily includes deciding what evidence is admissible, and what weight should be given to particular pieces of evidence having regard to the way in which an investigation was carried out. It is for the trial court in the requesting state to find the facts about how statements were obtained, which may go to admissibility or weight, both of which are matters for the court conducting the trial. It is the function of that court to decide whether evidence was improperly obtained and if so what the consequences for the trial are. It is for the trial court to decide whether its own procedures have been breached.
>
> 36. As those issues are for decision by the trial court in the requesting state, it cannot be an abuse of the extradition process of the requested state for such an issue to be shown to exist and for its resolution to be available only in the courts of the requesting state. The courts of the requested state cannot decide, let alone do so on partial and incomplete evidence, what it is for courts of the requesting state within the European arrest warrant framework (European Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA; OJ 2002 L190 , p 1), ("the Framework Decision")) to decide about such issues and with what effect on the trial."

100. As to the third point, the appellant submitted that the DJ was wrong to exclude evidence from Micu, the appellant's lawyer, on the basis that it was an attempt to relitigate the issue of the appellant's guilt; and wrong to conclude that it would be inappropriate to make findings as to Romanian law and procedure on the basis of the evidence of another of the appellant's lawyers, Andreia Pislaru. The appellant referred to a number of cases in which evidence from a requested person's lawyer was admitted. He again submitted that the relevance of this evidence was not simply to show that Judge Tudoran had made errors, but to show that the defects in the proceedings were so extensive that Judge Tudoran must have been motivated by improper considerations.

101. Mr Summers submitted that the evidence of the appellant's lawyers could not be relevant because the HCCJ had considered and rejected all the complaints made about the trial. He pointed out that the HCCJ had done so with a knowledge of Romanian law which this court does not have, and with sight of the evidence, which again this court does not have.

102. As to the fourth point, the appellant submitted that an appeal can only remedy a breach of art.6 in the proceedings below where the appeal court has conducted a full rehearing and has re-examined the case on the merits, which the HCCJ in this case did not do. In particular, bearing in mind that the appellant's case was that he always understood that the university was entitled to transfer Baneasa Farm, the HCCJ failed to address at all the issue of the appellant's *mens rea* – even though it was expressly raised in the grounds of appeal. He referred to *Michalak v Slovenia* (Application no 30157/03) in which the European Court of Human Rights (hereafter, "ECtHR") held, at [181], that any possible shortcomings concerning the impartiality of the court at first instance had been repaired by the re-examination of the case by an appeal court "having full jurisdiction". He also referred to *Beraru v Romania* (Application no 40107/04) in which the ECtHR held, at [82]–[84], that there had been a violation of art.6 rights where the HCCJ had not conducted "a new judicial examination of the available evidence and the parties' legal and factual arguments".

103. Mr Summers responded that the DJ did not say that the decision of the HCCJ had cured any lack of independence on the part of Judge Tudoran: on the contrary, he had stated at paragraph 527 of his judgment that the HCCJ had not sought to rectify any alleged judicial partisanship because it did not find that any existed. Mr Summers pointed out that the appellant had not made any allegation to the HCCJ that Judge Tudoran was biased or corrupt.

Grounds 3 & 4:

104. In the written submissions on Ground 3, the appellant submitted that the DJ wrongly failed to rule on the abuse of process argument which had been advanced before him. He relied on *R (Bermingham) v USA* [2007] QB 727 at [100] for the principle that it would be an abuse of the process for a prosecutor to seek extradition if he knew he had no real case and was pursuing extradition for some collateral motive, and distinguished that principle both from a challenge under section 13 of the Act and from a challenge under art.6. He argued that there was clear evidence that he had been targeted for political reasons. He attached great weight to a response to a request for further information in July 2018, in which Marin had said that the appellant was "the representative of a totalitarian regime that was removed through the anti-communist revolution". He relied on similar arguments in relation to Ground 4, but emphasised

that Ground 3 did not require attribution to political opinion, or any other particular characteristic, as section 13 of the Act does.

105. In the oral submissions, it was further argued that the respondent's action in continuing to pursue the extradition request was another indication that the prosecution of the appellant was improperly motivated.

106. Mr Summers, in response, drew attention to two paragraphs in the DJ's judgment. At paragraph 453 the DJ referred to "the theory advanced by the defence that [the appellant] was targeted as an important wealthy businessman, so as to strip him of his assets". At paragraph 456, the DJ found that there was no sufficient credible evidence to support the suggestion that the appellant was either investigated or prosecuted by reason of any actual or imputed political opinions he may have held. The DJ did not find that the appellant was in fact targeted with a view to depriving him of his assets. Mr Summers submitted that, even taking the appellant's theory at its highest, asset stripping could not amount in law to any of the reasons stated in section 13. The DJ had therefore been generous to the appellant in assuming that the appellant's case might be brought within section 13 of the Act. But in any event, he submitted, in the light of the finding at paragraph 456, which the DJ was entitled to make, the appellant could not prove the necessary causal link between the issuing of the EAW and any ground stated in section 13. Grounds 3 and 4 therefore could not succeed.

Ground 5:

107. The starting point for the appellant's argument was that, in a conviction warrant case, there may be a flagrant breach of art.5 if the requested person would be at risk of being imprisoned for a substantial period in the requesting state, having previously been convicted after a flagrantly unfair trial: see *Othman v UK* (2012) 55 EHRR 1 at [258], quoted in *Elashmawy v Italy* [2015] EWHC 28 (Admin) at [38].

108. Mr Fitzgerald submitted, relying on *Brown v Rwanda* [2009] EWHC 770 (Admin) and in particular on *Minister for Justice and Equality v LM* [2019] 1 WLR 1004, that a trial before a judge who is not independent and not impartial is a flagrant denial of justice. He drew a distinction between a structural lack of independence, for example in jurisdictions where defendants are tried by military courts, and a case in which the judge should not be sitting, because of reasons personal to him or her. His submissions concentrated on the latter category. His core contention was that the appellant had suffered a flagrant denial of justice because he was convicted by a judge who had a close and corrupt relationship with the complainant, Becali, who was himself a criminal. He submitted that Judge Tudoran's lack of impartiality was in itself sufficient for this court to find there was a flagrant denial of justice, but in the alternative *Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin) would permit a finding based on an accumulation of factors.

109. In summary, the allegations made in the fresh evidence on which the appellant relied were these:

i) Judge Tudoran had for many years behaved improperly whilst holding judicial office.

ii) He had a long association with Pirvu, an "underworld figure", which began when he helped Pirvu avoid prosecution following the death of his girlfriend. The relationship was so close that Pirvu arranged for food and services to be delivered at his (or his company's) expense to Judge Tudoran, and provided "the judge's special bar" at the Autovit premises, which Judge Tudoran visited almost daily. Judge Tudoran advised Pirvu and, on his behalf, Dojana as to how to prepare and conduct legal applications for the benefit of Pirvu's business activities.

iii) Judge Tudoran and Becali, another "underworld figure", had known each other for many years before the appellant's trial began in 2013. They had met regularly.

iv) Judge Tudoran, despite his judicial office, participated in a number of illegal gambling sessions with Becali, Pirvu and others.

v) Judge Tudoran solicited and received a bribe to help Becali obtain bail in criminal proceedings.

vi) Judge Tudoran advised and assisted Becali in his takeover of the Steaua football club. When Becali later became involved in litigation relating to certain associated rights, Judge Tudoran solicited a bribe to assist him to attain a favourable outcome, but asked for such a large sum that Becali declined to pay.

vii) Opris made separate allegations of criminal and corrupt conduct on the part of Judge Tudoran.

110. Mr Fitzgerald submitted that the evidence of Dojana, Dobrin, Dumitrescu, Ungureanu and Opris was credible and met the *Fenyvesi* criteria. He submitted in particular that Dojana's oral evidence – which included an admission to him by Judge Tudoran of improperly engaging in commercial activity whilst a serving judge - was decisive. It was submitted that the evidence clearly established that Judge Tudoran was not impartial and that the appellant therefore suffered a flagrant denial of justice, in violation of his art.6 rights, which could not be cured by the appeal to the HCCJ. Mr Fitzgerald accepted that Dojana's failure to complain sooner than he did may go to the reliability of his evidence, but argued that criticism of Dojana and other witnesses for not coming forward until very recently must be seen in the light of Romania having for a long time suffered from a corrupt judiciary. He pointed out that, on the evidence in Dobrin's statement, Opris denounced not only Judge Tudoran but also himself to the authorities, a step which it was submitted he was hardly likely to have taken if his allegations against Judge Tudoran were untrue. He submitted that if the DJ had known of this fresh evidence he would have been bound to reach a different decision.

111. Mr Fitzgerald further submitted that the respondent had failed to answer requests for information about the relationship between Judge Tudoran and Becali, and that the appellant should not be criticised for the fact that he has only recently been able to obtain some evidence about it. On 2 February 2021, in response to a question by those acting for the respondent about the friendly relationship between Judge Tudoran and Becali, the HCCJ Prosecutor's Office gave only the following answer:

> "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 National Anticorruption Directorate 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."

112. Mr Fitzgerald criticised that response, but submitted that even if the prosecutor did not know of the relationship, Judge Tudoran did, and should therefore have recused himself. Given the conflict of interest, the trial of the appellant could not be, and was not, fair.

113. It was further contended that Marin was partisan and had dealt with this case oppressively, unfairly and improperly. In particular, it was submitted that he was instrumental in initiating the prosecution of the appellant when the HCCJ prosecutor had found no grounds to investigate; he initiated a prosecution against Stoica for providing evidence supportive of the appellant, but stopped that prosecution after the appellant's appeal had been concluded; he initiated a prosecution of Becali for perjury when Becali made a statement exonerating the appellant; in 2018 he informed both the Bucharest Court of Appeal and the DJ that there had been no secret service involvement in the appellant's case, a claim contradicted by a Romanian Parliamentary Commission in March 2019; he is said to have met Judge Tudoran on 22 August 2019, the day before Judge Tudoran submitted his request to resign; in September 2020 he confirmed that Micu was under investigation for "compromising the interests of justice" by disclosing information in these proceedings relating to the suspected criminality of Judge Tudoran; in January 2021, despite an obvious conflict of interest, he quashed the *in personam* investigation into Judge Tudoran's suspected criminal handling of the appellant's trial (though it is acknowledged that the decision was upheld by the prosecutor general of Romania); and he initiated investigations against Ciorcan, and against two court clerks (Ms Pirlogea and Ms Melinte) for providing evidence supportive of the appellant.

114. In response, Mr Summers submitted that the appellant's complaints about the unfairness of his trial did not reach the level of a flagrant denial of justice. He noted that there had been a striking change both from the way the case was put by the appellant before the DJ and from the grounds of appeal as initially drafted. Having previously alleged that the appellant was the victim of a state-sponsored prosecution at the request of the then prime minister, it was now suggested that he was convicted by a judge who was biased because of his personal relationship with Becali and therefore had a private reason to deliver an adverse verdict. He submitted that this change of approach necessitated reliance by the appellant on an implausible coincidence.

115. As to the fresh evidence of the relationship between Judge Tudoran and Becali, Mr Summers submitted that the appellant derived no help from court documents relating to companies associated with Becali which had been signed by Judge Tudoran in his judicial capacity. He submitted that the statement of Ungureanu made no mention of Becali and was irrelevant. The statement of Dobrin was largely hearsay and was no more than a statement to a journalist: that, he submitted, was not a proper way to put

evidence before the court. He accepted that Dumitrescu had made a witness statement in proper form, Opris had made a statement to the SIIJ denouncing Judge Tudoran and Dojana had given oral evidence and been cross-examined. In relation to all the witnesses, however, he submitted that the *Fenyvesi* requirements were not satisfied, because no satisfactory explanation had been given as to why these witnesses were only now coming forward to speak of events many years ago. The explanation given by the appellant's Romanian lawyer, as to how she came to contact Dojana, raised more questions than it answered. *Fenyvesi* requires that the evidence be decisive, and there was no evidence which clearly established that Judge Tudoran had an undisclosed relationship with Becali before 2013.

116. Mr Summers submitted that in any event, the fresh evidence was not credible. He argued that the proposition that Becali and Judge Tudoran were engaged in a joint plan to generate a complaint against the appellant, so that Becali could gain a business advantage over his rival, is wholly inconsistent with the fact that Becali twice refused to testify against the appellant, and only gave evidence against him after a prosecution for perjury was commenced against him. Dojana is the lawyer acting for Panait, who has a grievance against Judge Tudoran and his family. Dojana himself was also the subject of a criminal denunciation in 2013 by Judge Tudoran's son, a fact which he failed to mention in either of his two witness statements in these proceedings. Both Dojana and Panait therefore had an obvious motive to make false allegations against Judge Tudoran. Evidence from witnesses such as these, submitted Mr Summers, was not capable of being decisive.

117. Mr Summers put forward a number of reasons why Dojana's evidence was unreliable. In particular, his evidence - if true - amounted to an admission that for many years he had acted for a criminal family and had engaged in professional misconduct and criminal activity. His allegations against Judge Tudoran were deliberately vague and contained nothing which could be investigated or verified. His claim not to have known for many years that he had been denounced by Judge Tudoran's son was obviously untrue. Most of what he said about Becali's relationship with Judge Tudoran was hearsay. If his allegations relating to Judge Tudoran and Becali's acquisition of the Steaua club, Becali's subsequent legal issues relating to that acquisition, and the taking of a bribe to secure Becali's release on bail, were true, they were all known to him and others well before the appellant's trial began in 2013 and throughout its long duration. It was incredible that neither Dojana nor any of the other 3 witnesses ever said anything about the allegations now made. Dojana's evidence that he saw media reports of the trial, but did not know Judge Tudoran was the trial judge, was incredible. So too was the claim that the witnesses kept silent out of fear, particularly when Dojana acted for Panait in relation to Panait's denunciation of Judge Tudoran. Dojana's motive for making false allegations against Judge Tudoran was important when considering his active role in arranging for other witnesses to make the statements now produced by Ciorcan. For those and other reasons, Mr Summers submitted, the appellant had failed to discharge the burden upon him. He accordingly submitted that the fresh evidence relating to Becali should not be admitted, and in any event could not bear the weight which the appellant sought to place upon it.

118. As to other aspects of the fresh evidence, Mr Summers submitted:

i) Evidence relating to the propriety of Judge Tudoran's decision to sever the civil proceedings was neither fresh nor decisive, and was in any event a matter dealt with by the HCCJ.

ii) The fact that a criminal file *in rem* was opened in 2019[9] was the automatic result of the appellant's making of an allegation of abuse of office against Judge Tudoran, and therefore said nothing about the merits of that allegation. The later decision to move to an *in personam* investigation was annulled by Marin, whose decision was upheld by the independent general prosecutor, on the compelling ground that the appellant's remedy lay in an appeal, not in a prosecution. The general prosecutor had found no factual basis for the allegation that Marin had an interest in stopping investigation of Judge Tudoran.

iii) The suggestions that Judge Tudoran's resignation was a device to avoid investigation, and that he must have met Marin when he attended the SIIJ offices in August 2019[10], were merely speculative. Judge Tudoran remained under investigation by Marin in relation to file 1603 (Panait's allegations[11]), a fact which was inconsistent with the suggested collusion between the two.

iv) The reliance by the appellant on the number of DNA investigations of judges and prosecutors presented a false picture. Anyone can make a criminal denouncement in Romania, and an investigation *in rem* must then be opened. The number of files opened is therefore not the same as the number of judges and prosecutors who have the legal status of suspect or defendant. Information provided by the respondent showed that the majority of the investigations related to denouncements made against judges by dissatisfied litigants, and about 80% were immediately closed as being manifestly unfounded. The information also showed that the DNA had not investigated Judge Tudoran. The suggestion that the DNA had some leverage over Judge Tudoran was therefore unfounded.

In summary, Mr Summers submitted that there was nothing in these points which supported an allegation that Judge Tudoran lacked integrity or independence.

119. Mr Summers submitted that it was for the appellant to prove on the balance of probabilities that there was an undisclosed relationship. He relied in this regard on *Elashmawy v Italy*. But even if some lower standard was applicable, he contended that this court should be cautious about finding that a judge of a friendly EU member state was corrupt, especially when the allegation rested principally on the evidence of a lawyer whose behaviour was, at the least, morally questionable; and even more so in the context of extradition proceedings in which the court was required to observe presumptions of good faith and mutual trust. He relied on a well-known passage in Lord Nicholls' speech in *re H(Minors)* [1996] AC 563 at p586D:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation is the less likely it is that the

[9] See [26] above.
[10] See [72] above.
[11] See [27] above.

> event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

120. Mr Summers went on to argue that, even if this court were persuaded that Judge Tudoran was biased, it would not follow from that fact alone that the appellant had suffered a flagrantly unfair trial. Relying on *Orobator v Secretary of State for Justice* [2015] EWHC 58 (Admin) and *Rwanda v Nteziryayo* [2017] EWHC 1912 (Admin) he submitted that lack of judicial independence did not necessarily lead to a conclusion that a defendant had had the essence of his right to a fair trial nullified. Even if Judge Tudoran knew Becali, it did not necessarily follow that Becali's allegation against the appellant must have been unfounded. It was necessary to examine whether the trial was in fact unfair; and in the present case, the answer to that enquiry was provided by the decision of the HCCJ, which examined all the appellant's arguments and held the trial to have been fair. That was the independent decision of Romania's Supreme Court applying Romanian law, conducting a thorough review (including of the appellant's submissions as to his lack of *mens rea*) and finding the convictions to be justified on the evidence. The HCCJ found that the appellant did in fact receive a fair trial before Judge Tudoran, and there was no denial of justice.

121. Mr Summers submitted that the judgment of the HCCJ deserved a high level of mutual trust from this court. There had been no suggestion that any of the judges who heard the appeal was linked to Becali. None of them was the subject of any extant DNA file. The only concrete allegation put forward by the appellant was that Judge Arghir had heard and refused a bail application eight years earlier, in which she necessarily made an assessment of the apparent strength of the evidence against the appellant.

Ground 6:

122. Mr Caldwell submitted that nearly four years after the pilot decision in *Rezmives and others v Romania* (nos. 61467/12 etc), 25 April 2017, systemic problems in the penal system still continued, and that the adequacy of the assurances given by Romania must be viewed in light of that enduring problem. He submitted that the DJ wrongly failed to consider the interplay between minimum space and material conditions, and was wrong to accept the assurances provided by the respondent as sufficient. He focused on conditions at Rahova prison, where the appellant would spend an initial period of 21 days in quarantine and where he was likely to be detained whilst subject to the closed regime until transferred to semi-open or open conditions, probably at Jilava prison, at some future time. He suggested that there is a risk that the appellant might be moved for up to 5 days, for example if there was a fight in the prison. He suggested that the terms of the assurances showed that Romania was only just able to comply and there was therefore a risk of a breach of art.3 if a temporary move is necessary.

123. Mr Caldwell relied on the latest report of a meeting of the Committee of Ministers in March 2021, which of course was not before the DJ. The report welcomed the strong commitment demonstrated by the Romanian government in search of a comprehensive and sustainable solution to the problems identified in *Rezmives*, expressed satisfaction at the measures included in a revised action plan prepared in November 2020, and stated their strong expectation that the government will continue to ensure all the support required for the effective and timely implementation of those measures. The report went on however to note with concern the persistent overcrowding in the prison system,

which had been aggravated over the preceding 6 months. Mr Caldwell submitted that this report supported his argument that the assurances given by the Romanian government should not be regarded as adequate to protect the appellant against breach of his art.3 rights.

124. Mr Summers responded that the Romanian government has given, in good faith, assurances in relation both to minimum space and material conditions which are sensible and realistic and which, this court should assume, will be complied with. Chirita's evidence before the DJ confirmed that Rahova prison has cells which will afford the requisite minimum space and, in view of the assurances given, his concerns about other cells could not assist the appellant. The overall picture, he submitted, was manifestly compliant with Article 3 unless this court assumed that the assurances would not be complied with. Romania had guaranteed the necessary minimum space for the appellant whether or not it was able to guarantee it for every other prisoner. He relied on *Adamescu v Romania*, especially at [173], and submitted that the evidence of a risk of breach of art.3 is no stronger in this case than it was in that.

Further submissions after the hearing:

125. Written submissions have been made by both parties in respect of the very recent decision of the ECtHR in *Bivolaru and Moldovan v France* (applications 40324/16 and 12623/17). The official version of the judgment is at present only available in French, but an English translation was helpfully obtained by the appellant's solicitors.

126. In *ML* [2019] 1 WLR 1052 at [87] the Court of Justice of the European Union (hereafter, "CJEU") held that in extradition proceedings, an executing judicial authority is only required to assess the conditions of detention in the prisons to which it is actually intended that the requested person will be detained, including on a temporary or transitional basis. That approach was followed by a Divisional Court in *Varga v Romania* [2019] EWHC 890 (Admin): see [21].

127. The appellant submitted that in the case of *Moldovan* the ECtHR departed from that approach. It held that the executing authority had failed properly to assess the information provided by Romania about the prison regime and material conditions, and at [126] found a violation of art.3 on the basis that there was a real risk of the appellant being exposed to inhuman and degrading treatment because of his detention conditions in Romania, such that the executing authority could not simply defer to the statements made by the Romanian authorities.

128. The appellant further submitted that the assurances given in *Moldovan* were very similar to those given by the respondent in the present case, and were in "stereotypical, if not boiler-plate, terms". He argued that the decision in *Moldovan* entitled this court to consider the prospective risk that he will be held in a prison other than those referred to in the assurances, namely Rahova and Jilava, and that the court should conclude that in relation to other possible prisons there is no answer to the *Rezmives* presumption of a real risk of violation of art.3.

129. The appellant later added a further submission, relying on the very recent decision in *Romania v Iancu* [2021] EWHC 1107 (Admin).

130. The respondent pointed out that the decision in *ML* was approved by the Grand Chamber of the CJEU in *Dorobantu* (C-128/18), [2020] 1 WLR 2485. It submitted that, in relation to art.3 rights in this context, there is a presumption that compliance with CJEU case law in relation to article 4 of the EU Charter of Fundamental Rights provides equivalent protection to that provided by the decisions of the ECtHR. The decision in *Moldovan* was therefore surprising insofar as it appears to say that the failure to consider conditions at a potential different prison was a manifestly deficient failing sufficient to rebut the presumption of equivalent protection.

131. The respondent submitted that on the facts, the decision in *Moldovan* – even if it were thought to prevail over the decisions of the Grand Chamber of the CJEU – cannot help this appellant. In contrast to *Moldovan*, the Romanian authorities have specified the prison in which the appellant is likely to serve the latter part of his sentence, have provided detailed assurances concerning the detention conditions at that prison, and have given an assurance of a minimum personal space of at least 3 m² in any prison at which the appellant may be held.

Discussion:

132. This is in many ways an extraordinary case.

Ground 1:

133. I can address Ground 1 very briefly. It is in my view without merit, essentially for the reasons given by Mr Summers, and I reject it. The DJ heard the evidence and submissions at length. In paragraphs 79-345 of his judgment the DJ summarised the evidence of the fourteen witnesses called by the appellant, and gave a clear and reasoned assessment of their credibility and of the weight he felt able to attach to each of them. I find no substance in the complaint of an "atomistic" approach. The DJ was entitled to make the findings he did. He was entitled to conclude that the evidence of a particular witness was unreliable or could carry little weight. He was not obliged to refer to every one of the points made to him over many days of hearings.

134. I deprecate the terms in which the DJ was criticised in the written submissions. Mr Fitzgerald emphasised in his oral submissions that he did not seek to impugn the DJ and there was no suggestion of bad faith. He therefore acknowledged that the use of the word "partial" was "unfortunate".

Ground 2:

135. I also reject Ground 2. The first of the appellant's points fails, in my view, because (as Mr Fitzgerald effectively conceded in his oral submissions) the DJ did not exclude the evidence: rather, he received it, but gave it limited weight. He was entitled to do so, for the reasons which Mr Summers gave, and he made no error of law. The DJ clearly considered the wide-ranging criticisms of the Romanian criminal justice system around the time of the appellant's trial, and was entitled to conclude that there was no evidence of improper involvement of the SRI, or application of the "secret protocols", in this case. Moreover, the premise of the appellant's argument that he was a victim of a systemically-compromised judiciary was in my view very weak, because it does not appear that any convincing basis was put forward as to why the then President of Romania, or anyone else in high office, might have wished to initiate a corrupt judicial

process in order to secure a conviction of the appellant. Similarly, the reasons suggested at trial for why Judge Tudoran was susceptible to being pressurised to return a conviction were very largely based on speculation.

136. On the second point, I accept Mr Summers' submission that the appellant was impermissibly trying to relitigate issues which it was for the Romanian courts to decide.

137. The third point fails, in my view, because - on the evidence as it stood before the DJ - it was again an attempt to relitigate issues properly determined by the Romanian courts. I reject the appellant's attempt to escape from the prohibition on such relitigation by arguing that Judge Tudoran's conduct and decisions were so extensively and seriously flawed as to give rise to an inference of improper motivation: that argument necessarily depends on an analysis of each of the individual acts and decisions which are said to contribute to the overall grounds for such an inference. I will consider later in this judgment the effect of the fresh evidence now relied upon.

138. The fourth point is in my view conclusively answered by Mr Summers' response.

Grounds 3 and 4:

139. Taking grounds 3 and 4 together, I accept the appellant's submission that the DJ did not specifically rule on the abuse of process argument. It is however clear, in my view, that he rejected what was only ever a theory that the appellant was targeted either for political reasons or with a view to stripping him of his assets. On the evidence before him, he was entitled to do so. The evidence of Chirita, which it is said the DJ wrongly excluded and which it is now sought to supplement with fresh evidence, contained many criticisms of the Romanian criminal justice system in general, but was in my view unpersuasive in its support for the appellant's case. I agree with Mr Summers' submission that the comment by Marin, referred to at [104] above, was no more than an understandable response to a complaint by the appellant that Romania was operating a totalitarian regime at the time of his prosecution. It could not realistically be regarded as evidence in support of the appellant's case, and the attempt to rely on it was in my view revealing as to the weakness of the appellant's case in relation to these grounds of appeal. Neither limb of section 13 could assist the appellant because, even on his theory, there was no evidence that the EAW was issued for the purpose of prosecuting or punishing him on account of his actual or imputed political beliefs. In my view, the appellant failed to establish any foundation for these grounds of appeal, from which in any event the focus had substantially shifted by the time of the appeal hearing. It follows that neither of these grounds of appeal can succeed, and I reject them both.

Ground 5:

140. Thus far I have dealt briefly with grounds of appeal which, although the subject of extensive submissions earlier in these proceedings, fell outside the principal focus of the appellant's case in this court. I now turn to that principal focus, which is the submission that the fresh evidence shows that the appellant has suffered, or will suffer if returned to Romania, a flagrant denial of justice. I shall concentrate on the way Ground 5 was argued at the hearing, rather than on the written submissions prepared at a time when not all the fresh evidence was available.

"A flagrant denial of justice"- principles:

141. In *Othman v UK* (2012) 55 EHRR 1 the ECtHR confirmed at [258] that an issue might exceptionally be raised under art.6 by an extradition decision in circumstances where the requested person has suffered, or risked suffering, a flagrant denial of justice in the requesting state. It explained that the phrase "flagrant denial of justice" was synonymous with a trial which was manifestly contrary to the provisions of art.6 or the safeguards embodied therein. At [260] the court emphasised the stringency of that test:

> "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."

142. The court added, at [261], that it is for the applicant to adduce 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. Where such evidence is adduced, it is for the Government to dispel any doubts about it.

143. In the context of a conviction EAW, there may be a flagrant breach of art.5 if the requested person would be at risk of being imprisoned for a substantial period in the requesting state, having previously been convicted after a flagrantly unfair trial: *Othman* at [233], *Elashmawy* at [38]. Again, and as the appellant accepts, it is clear that the threshold for flagrant unfairness is high. Two further questions then arise.

144. First, can that high threshold be reached by aggregating a number of deficiencies in the trial, none of which would individually amount to a flagrant denial of justice? The appellant submits that it can, although his primary argument is that his trial was flagrantly unfair because of Judge Tudoran's bias in favour of Becali. The respondent, relying on *Orobator*, submits that it cannot.

145. In *Orobator* the claimant sought release from a life sentence which she was serving in the UK following conviction in another state. Her case was that she had been the victim of a flagrant denial of justice because of the institutional lack of judicial independence and impartiality in the state concerned, and/or because of a combination of features (lack of legal representation at key points in the process, threats and intimidation, lack of proper opportunity for case preparation and incompetent representation by a lawyer who was not independent of the executive). The Divisional Court held that conviction by a court which is not independent and not impartial undoubtedly involved a breach of art.6, but did not necessarily involve a flagrant denial of justice: whether it did so was a fact-specific question depending on the particular facts of the case. The court went on to hold, on the facts, that there had been no flagrant denial of justice. In doing so, it emphasised the importance of not jeopardising or undermining international treaties as to repatriation of prisoners. It did not however say anything to suggest that a combination of features of unfairness could not be relied upon to show a flagrant denial of justice. On the contrary, it was in my view implicit in the court's approach that such a combination could in principle amount in the aggregate to a flagrant denial of justice even if no one feature would by itself have passed that high threshold.

146. I can see no reason in principle why a number of features, individually amounting only to a breach of art.6 rights, could not in the aggregate be found to have nullified or destroyed the very essence of the right to a fair trial. I would therefore accept the appellant's submission on this point as being correct in principle.

147. The second question is as to the measure of the risk of exposure to a flagrant breach of art.5 rights. It is clear that, in the context of an accusation EAW, the court is necessarily concerned with an assessment of how the requested person may be treated by the requesting state in the future, and the test is whether there are substantial grounds for believing that, if returned, he would be exposed to a real risk of being subjected to a flagrant denial of justice. In circumstances such as this case, however, the argument is that the appellant 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 will be a flagrant breach of his art.5 rights. Is it, in such circumstances, necessary for the requested person to prove on the balance of probabilities that his trial did in fact involve such flagrant unfairness as to deprive him of the essence of his art.6 rights?

148. The appellant submits that it is sufficient for him to show that his conviction by Judge Tudoran "may well have been" the result of a flagrant denial of justice. He relies in this regard on *Brown*; the decision of the High Court of the Republic of Ireland in *Minister for Justice and Equality v Rostas* [2014] IEHC 391; and *Rwanda v Nteziryayo*.

149. In *Brown*, the appellants were yet to be tried in the requesting state, and the question which I have posed above therefore did not directly arise. It should however be noted that at [31] the court endorsed as "plainly right" the concession by counsel for the requesting state that if the appellants were brought for trial before a tribunal which was not impartial and independent, that would indeed constitute a flagrant breach of their art.6 rights.

150. The respondent in *Rostas* was the subject of a conviction EAW. The judge held at [92] that, in the light of the decision in *Othman* –

> "… 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."

151. In paragraphs 110-115 the judge referred to a number of features of the respondent's account of the trial process. He emphasised that, whilst it was impossible for the court to form any view as to whether the relevant events had actually occurred, the exceptional circumstances of the case were such that he could not "foreclose on the possibility" that the respondent's account may indeed be true. He stated at [115] that he was not merely acknowledging a remote or theoretical possibility: he found that the available evidence was cogent and raised "a real and significant concern that the respondent may not have had a fair trial". He concluded that there were substantial grounds for believing that there was a real risk that the respondent had suffered a flagrant denial of justice in the requesting country.

152. In the later case of *Nteziryayo* the Government of Rwanda appealed against a decision not to order extradition of the respondents to stand trial. Again, therefore, the specific question which I am considering did not directly arise. The Divisional Court did however touch upon it at [87], observing that there was force in counsel's submission, when considering *Orobator*, that -

> "… a retrospective examination of whether there was in fact a 'flagrant denial of justice', in a completed case where the facts are known, may be significantly different from considering whether there is a real risk of a flagrant denial of justice in the future. The one is history, the other an assessment of future risk."

153. The court went on, at [97] – [98], to hold that judicial prejudice or bias – "no doubt almost always arising from political or other pressure" – could amount to a flagrant denial of justice, but would not necessarily do so if it were mitigated by other adequate features of the trial process:

> "… the risk required must comprise a risk of real substance, a risk of a truly serious denial of justice."

154. I have reflected on the significance, in this context, of the distinction between past history and an assessment of future risk. I have concluded that the court in *Rostas* (the only one of the cases mentioned which bears directly on this issue) was correct to apply the test of substantial grounds for believing that there was a real risk that the requested person's trial had been flagrantly unfair. 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 art.5 rights which may be a bar to extradition. The fact that the trial has already taken place may in practice make it harder for a requested person to establish substantial grounds for believing that a real risk exists; but subject to that, it seems to me 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. I therefore accept the appellant's submission on this question.

155. I accordingly turn to a consideration of whether the appellant has shown substantial grounds for believing there is a real risk that his imprisonment in Romania would involve a flagrant violation of his art.5 rights and, if so, whether the respondent has sufficiently answered that concern.

"A flagrant denial of justice" in this case?

156. The initial basis on which the appellant argued that Judge Tudoran lacked independence and impartiality, which alleged systemic intrusion into judicial independence by the Romanian authorities, coupled with suggested reasons why Judge Tudoran may have been placed under particular pressure to secure a conviction of the appellant, was in my view unconvincing, and the DJ was clearly entitled to reject it. The argument appeared to be that those in high office in Romania wanted the appellant convicted because they wanted to take control of his assets; therefore it was important that Judge Tudoran delivered a conviction; therefore the DNA and/or other authorities must have

put Judge Tudoran under pressure by threats or hints that his son would be prosecuted for an unspecified crime; and then the judges of the HCCJ must also have been biased because they upheld the conviction on appeal. That, in my view, involved speculation upon speculation, without any substantial evidential basis. There appears to have been no evidence before the DJ as to why the appellant would have been targeted for asset-stripping, and therefore no basis even for the first step in the argument. So far as the HCJJ is concerned, the basis of the argument was, at best, the hopelessly weak proposition that Judge Arghir must have pre-judged the appellant as guilty because she had assessed the evidence as strong when hearing a bail application some 8 years earlier.

157. So far as the serious allegations against Marin are concerned, they all seem to me to presuppose a knowledge on Marin's part that the appellant was in truth innocent of any criminality in relation to the transfer of land at Baneasa Farm, so that Marin must have been acting from a corrupt motive in pursuing the prosecution as he did. The appellant's case loses much of its force once it is recognised that Marin may have believed the appellant to be guilty. Given that the appellant chose not to give evidence, the DJ was entitled to reject this aspect of the appellant's case.

158. It follows that in my view, if the focus had been entirely on the evidence and submissions before the DJ, this ground of appeal would have failed.

159. It is not, however, necessary to say more about the arguments previously advanced, because the appellant now relies on fresh evidence which provides a very different basis for his case, and which takes this court far away from the evidential position before the DJ. If accepted, it is evidence that Judge Tudoran has over many years conducted himself in a wholly unjudicial manner, and has been guilty of corrupt acts in particular in his dealings with Pirvu and Becali. A key feature of the relationship alleged between Judge Tudoran and Becali is the soliciting of bribes. Another key feature is the participation of the two men in illegal gambling. It is unnecessary and inappropriate to consider different circumstances in which a complaint of a lack of judicial impartiality and independence might arise. A fact-specific assessment will be necessary in each case in order to determine whether there has been a flagrant denial of justice. In this case, it suffices to say that I have no doubt that, if such a relationship existed, Judge Tudoran plainly should not have tried the appellant: he could not be impartial in deciding a case based upon the complaint and evidence of Becali, and the appellant would therefore be exposed to a real risk that he would be denied the essence of his art.6 right to a fair trial.

160. The oral and written fresh evidence against Judge Tudoran comes from men who, to a greater or lesser extent, appear to be implicated in conduct which, at the least, was immoral and inappropriate. No one emerges with much credit from this evidence. Much of what Dojana said in his oral evidence was based on hearsay, and a good deal of it was unconvincing. His claim that he had only quite recently learned that the appellant had been tried by Judge Tudoran was in my view simply incredible. Moreover, there were, in my view, worrying signs that he was tailoring his evidence to fit with submissions made on behalf of the appellant. Most strikingly, on the day after there had been submissions as to whether the actions of Dumitrescu, Dobrin and Ungureanu could be explained on the basis that they were in fear of Judge Tudoran, Dojana volunteered for the first time that they were indeed in fear. That, and other

features of his evidence, have caused me to hesitate for a long time over whether I can accept any of what he said.

161. In relation to other witnesses now relied upon, I accept many of the criticisms which Mr Summers made. I agree there are serious concerns about the appellant's reliance on the statements produced by Ciorcan. Dumitrescu, Dobrin and Ungureanu are not put forward as witnesses seeking anonymity because they believe themselves to be in danger. There is on the face of it no reason why they could not make formal witness statements and, if permitted, give oral evidence so that they could be cross-examined. The process by which their statements were produced and relied on in this court was highly unsatisfactory. Again, therefore, I have hesitated over whether I can accept any of this evidence.

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 appellant had emphasised the evidence of Dojana as to his witnessing a meeting between Judge Tudoran and Becali whilst the appellant's trial was taking place. That particular point has been taken away from the appellant 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 appellant.

163. The respondent 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 respondent to a formal request for information about the relationship between Judge Tudoran and Becali[12]; but I agree with Mr Fitzgerald that it was very unsatisfactory. I would have expected the respondent, 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 appellant 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

[12] See [111] above.

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 appellant'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 appellant'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 appellant 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 appellant 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[13] are accordingly satisfied.

168. Ground 5 therefore succeeds. I would allow the appeal on that ground, quash the order that the appellant be returned to Romania and order his discharge.

169. That is sufficient to determine this appeal. For completeness, however, I shall address Ground 6. I do so briefly because my decision in this regard does not affect my decision as to the outcome of this appeal.

Ground 6:

170. The Divisional Court in *Adamescu* dealt at some length with issues relating to prison conditions in Romania. In the light of that judgment, Mr Caldwell was constrained to limit his submissions to concerns as to what might happen if for any reason it became necessary to move the appellant from one of the prisons in which it was expected he would serve his sentence if extradited. As Mr Summers pointed out, however, assurances have been provided that the appellant would be held in conditions which complied with art.3, wherever he might be detained. In my view, the DJ was entitled to accept that those assurances were sufficient and satisfactory. I agree with Mr Summers' submission that the appellant's case as to a real risk of a violation of his art.3 rights was no stronger than that of the appellant in *Adamescu*.

[13] See [56] above.

171. In *Moldovan* the appellant had produced weighty evidence of systemic or generalised shortcomings in Romanian prisons. The Romanian judicial authority had provided assurances, which the judge at first instance had accepted as sufficient. The ECtHR held that the judge had been wrong to do so: the assurances only guaranteed personal space of less than the minimum standard stated in *Mursic v Croatia* of 3m² of floor space per prisoner in a multi-occupancy cell (paragraph 122); and the judge below had failed to assess the risk of a breach of art.3 in relation to other aspects of the conditions of detention, as to which the only information provided by the Romanian authorities was "described in a stereotypical way" (paragraph 124).

172. In *Iancu* Chamberlain J at [36] summarised the decision in *Bivolaru and Moldovan* as confirming the existence of a real risk of treatment contrary to art.3 in Romanian prisons and cautioning against exclusive reliance on generic assurances by the Romanian authorities to address those risks. I respectfully agree with that as an accurate summary.

173. However, I accept the submission of the respondent that there is a clear distinction on the facts between this case and *Moldovan*. The assurances given in respect of this appellant do guarantee him 3m² of personal space. The DJ was entitled to accept the assurances given by the Romanian authorities as sufficient and satisfactory. Moreover, the DJ did include other conditions of detention in his assessment of the risk of a violation of the appellant's art.3 rights. He had evidence from the appellant's witness Chirita which included a number of concessions favourable to the respondent. He was entitled to accept that the appellant had the benefit of sufficient and satisfactory assurances.

174. In those circumstances, the decision in *Bivolaru and Moldovan* cannot affect my decision in respect of this ground of appeal, which I would dismiss. It is therefore unnecessary to consider whether *Moldovan* should prevail over the decisions of the Grand Chamber of the CJEU. That issue must await resolution if and when necessary in another case. I would however observe that in my view, the caution against "stereotypical assurances" should be regarded as an exhortation to focus on substance rather than form, and should not be taken as meaning that any use of a form of words which has also been used in another case must necessarily be regarded as inadequate to satisfy a court that art.3 obligations will be observed. There are, after all, only so many ways in which one can express an assurance that a particular prisoner will be guaranteed at least 3m² of personal space wherever he is detained.

Mr Justice Jay:

175. I agree.

Postscript: Lord Justice Holroyde and Mr Justice Jay:

176. Following the provision to counsel of draft copies of the above judgments, Mr Summers QC drew to the court's attention the recent decision of Chamberlain J in *Kaderli v Chief Public Prosecutor's Office of Gebeze, Turkey* [2021] EWHC 1096 (Admin). We are grateful to him for doing so. We note that the learned judge in that case reached a different conclusion as to the point of legal principle referred to in [147] above. His reasons reflect points which we have considered in reaching our decisions in the present case, and we respectfully disagree with his conclusion.