Neutral Citation Number: [2021] EWHC 87 (Admin)

Case No: CO/4048/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2021

Before:

MR JUSTICE GARNHAM

- -

Between:

MRT	**Appellant**
- and -	
Government of the Republic of North Macedonia	**Respondent**
- and -	**Interested**
Secretary of State for the Home Department	**Party**

- -
- -

Malcolm Hawkes (instructed by **National Legal Service**) for the **Appellant**
Adam Payter (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 2nd December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 20 January 2021.

Mr Justice Garnham:

Introduction

1. The Appellant, to whom I shall refer as "MRT" or "the Appellant", appeals against a decision of the Secretary of State for the Home Department dated 26 September 2019, to order her return to North Macedonia. That decision by the Secretary of State follows the decision of District Judge Vanessa Baraitser of 7 August 2019 to send her case to the Secretary of State.

2. Permission to appeal was refused on the papers on 3 July 2020 but granted by Mr Justice Lane at an oral renewal hearing on 18 March 2020. The permission granted, however, was limited to two grounds, namely;

   i) Pursuant to s.82 of the 2003 Act, that it would be unjust or oppressive to extradite her by reason of the passage of time since she committed the extradition offence.

   ii) Pursuant to s.87 of the Extradition Act 2003 ("the 2003 Act"), that her extradition would be incompatible with her rights under Article 8 of the ECHR;

3. North Macedonia is a Part 2 country under the 2003 Act and makes its request pursuant to Article 12 of the 1957 European Convention on Extradition.

4. The question for me on this appeal is that set out by Lord Burnett, LCJ, in *Love v USA* [2018] EWHC 172 (Admin) at paragraph 25:

> "The statutory appeal power …permits an appeal to be allowed only if the district judge ought to have decided a question before him differently and if, had he decided it as he ought to have done, he would have had to discharge the appellant. The words "*ought* to have decided a question differently" (our italics) give a clear indication of the degree of error which has to be shown. The appeal must focus on error: what the judge *ought* to have decided differently, so as to mean that the appeal should be allowed. Extradition appeals are not re-hearings of evidence or mere repeats of submissions as to how factors should be weighed; courts normally have to respect the findings of fact made by the district judge, especially if he has heard oral evidence. The true focus is not on establishing a judicial review type of error, as a key to opening up a decision so that the appellate court can undertake the whole evaluation afresh. This can lead to a misplaced focus on omissions from judgments or on points not expressly dealt with in order to invite the court to start afresh, an approach which risks detracting from the proper appellate function. That is not what *Shaw* or *Belbin* was aiming at. Both cases intended to place firm limits on the scope for re-argument at the appellate hearing, while recognising that the appellate court is not obliged to find a judicial review type error before it can say that

> the judge's decision was wrong, and the appeal should be allowed"

The Conviction

5. The Appellant was convicted, in absentia, in North Macedonia on 21 January 2015, of a single offence of "*making of and using fake payment cards*" contrary to Article 247b and 22 of the North Macedonian Criminal Code. She and her two co-defendants were all Bulgarian nationals. She was sentenced to five years imprisonment, all of which term still remains to be served, and ordered to pay a fine.

6. The offences took place, in June 2010, in the North Macedonia capital Skopje. The District Judge described the request for the Appellant's extradition to North Macedonia this way:

> "On 9 June 2010, (MRT), and her two co-defendants Blegoslav Demirov and Rodoslav Kirilov, installed an external device on an Automated Teller Machine (ATM) belonging to Stopanska banka Ad Skopje located at Karposh 4 and 21 June 2010 at an ATM in TC Ramstore. They copied the data from approximately 100 legitimate payment cards and on 21 June 2010 and 22 June 2010 they used the false payments cards to remove money from ATM/s in Skopje.
>
> The following transactions took place at ATMs belonging to Stopanska banka: on 22 June 2010 Mr.Demirov carried out three successful transactions to obtain 54,000 MKD and fourteen unsuccessful transactions attempting to obtain an additional 257,500 MKD, causing a total loss to Stopanska banka Ad Skopje of 54,000 MKD; on 22 June 2010 Mr Kirilov carried out six successful transactions to obtain 22,500 MKD and two unsuccessful transactions, causing a total loss to Stopanska banka Ad Skopje of 22,5000 MKD; and on 22 June 2010 (MRT) carried out two successful transactions to obtain 7,8000 MKD and other unspecified transactions causing a total loss to Stopanska banka Ad Skopje of 7,800 MKD.
>
> The total loss to Stopanska banka Ad Skopje was 84,300.00 MKD, however the bank claims compensation in the sum of 1,044,000 MKD. The Request states: "*the damaged Stopanska Banka AD Skopje for the stated compensation claim ie for the difference from the determined amount of occurred damage in amount of 84,000 KML up to the amount of the state amount of compensation claim in amount of 1,044,000.00 MKD ie referred to a civil procedure*" (Request page 15).
>
> The following transactions took place at ATMs belonging to Tutunska Banka: on 22 June 2010 the defendants using four different payment cards attempted unsuccessfully to obtain a total of 217,5000 MKD."

7. Although there are different emphases put on the offending, this description of the allegations against the Appellant is not seriously in dispute.

The Appellant's History

8. The Appellant is Bulgarian and grew up with her parents in Lovech, a town in Bulgaria where her father still lives. She has an undergraduate degree and two Master's degrees.

9. She first moved to the UK on 29 April 2013 and registered as a seasonal agricultural worker with the Home Office. On 1 May 2013, she obtained a position on a farm in Worcestershire and obtained a National Insurance number the following month. During her time at the farm, she fell pregnant and on 15 September 2014, she returned to Bulgaria to live with her parents and to give birth. She continued to live with her parents at her address in Lovech, and she went to university to study.

10. On 15 April 2016, she returned to the UK to find work, leaving her son, T, with her mother in Bulgaria. On 24 January 2017, she rented a house in Oswestry in Shropshire. She says that throughout this period she was in daily telephone and Skype contact with her son and would return to Bulgaria every two to three months, for up to three weeks at a time.

11. In May 2017, she returned to Bulgaria to fetch her son and her mother who returned with her to England. She said the arrangement was that her mother would stay at home while the Appellant worked. That arrangement has continued ever since. T is presently attending a pre-school attached to Our Lady and St Oswald's Catholic Primary School in Oswestry. He started in reception at that same school in September 2019. The Appellant supports both her mother and her son out of her wages. The Appellant's mother continues to provide childcare whilst the Appellant is at work.

The District Judge's Decision

12. District Judge Baraitser provided a detailed and lengthy judgment running to 75 paragraphs.

13. She accurately set out the nature of the application and the request and identified the three issues which, at that stage, arose. The Article 3 challenge is no longer pursued. She set out the evidence she heard, and the information provided by the requesting state in the request and in subsequent further information. She set out in detail the evidence she heard from the Appellant and the Appellant's mother.

14. At paragraphs 37-50, the District Judge dealt with the challenge under s.82. She identified the correct approach to the interpretation of the phrase "*unjust or oppressive*" by reference to *Kakis v Cyprus* 1978 1 WLR 779 and *Gomez v Trinidad and Tobago* [2009] UKHL 21.

15. At paragraph 42, she described the nature of the case against the Appellant:

> "In short, skimming devices were placed on various Automated Teller Machines (ATMs) in order for the data from payment

> cards to be copied, replicated and subsequently used to illegally withdraw finds from the bank."

16. She said the case seemed to rely on documentary evidence, Border Agency records, banking records, statements from representatives of the banks and video footage.

17. She observed that it is not in dispute that the Appellant was not a fugitive from justice and therefore was entitled to rely on the s.82 bar of oppression. However, she said she was not satisfied that the test of oppression had been met. She observed that that test is not easily satisfied, and that mere hardship is not enough. She said the offence in question was relatively serious and was, by its nature, sophisticated. The offence was planned:

> "It was carried out by a group of at least three people; the group were in North Macedonia for only three days during which time they committed the offences, suggesting a plan to enter the country for that purpose. The combined overall loss to the victim banks was 341,800 MKD (or £4,612 at the currency exchange rate from 2010)".

18. The further information of 18 June 2019 indicated that the Appellant "*not only used the cards to withdraw 7,800MKD*" (or £105.25 at the currency exchange rate from 2010) but also that she "*effected one hundred successful illegal transaction in the sum of*" £20,578 at 2010 exchange rates.

19. Referring to *R v Hatos and Iorga* [2015] EWCA Crim 2188, she said that, in this jurisdiction, it is highly likely a prison sentence would have been imposed for the offence. She added that:

> "In any event, North Macedonia is entitled to set its own sentencing regime and levels of sentence and it is not for a UK judge to second-guess that policy. In this case a court in North Macedonia decided to impose a lengthy sentence of five years immediate imprisonment."

20. The District Judge then turned to deal with the passage of time since the commission of the offence. She acknowledged that, since those offences, the Appellant had led a law-abiding life in the UK. She noted that the Appellant was recently settled in the UK. She noted that she now has a son, T, aged four, born after this allegation arose. I return below to her observations about T. She concluded that the Government has not been culpable in this delay. She set out in some detail the chronology of events taken both from the chronology prepared by Mr Payter and from the request and further information. She went on at paragraph 49:

> "It is clear from the above that on being informed in 2011 that (MRT) was a Bulgarian national, the Government made efforts, using the international channels available to it, to locate her before convicting and sentencing her on 21 January 2015, a decision which became final on 26 February 2016. Therefore, in the extradition context the Government cannot be unduly criticised as a domestic arrest warrant was issued on 7 July

> 2015, an international arrest warrant on 13 June 2016 and notification was made to the UK of the request on 4 July 2018."

21. She concluded that the bar of oppression had not been established.

22. The District Judge then turned to deal with s.87 and human rights considerations. In dealing with Article 8, she referred to the familiar decisions of *Norris v USA* [2010] UKSC 9 and *Poland v Celinski* [2015] EWHC 1274 (Admin).

23. She said that the Appellant had come to the UK relatively recently. She then turned to the circumstances of her son, T. She said that "*His involvement significantly strengthens her Article 8 submissions*". She set out the circumstances referred to above before noting that "*the interest of any children are not necessarily the paramount consideration and although they are a primary consideration they are not always the only primary consideration*." She confirmed her conclusion that the allegations faced by the Appellant were "*relatively serious*".

24. She then turned finally to conduct the *Celinski* balancing exercise. At paragraph 72-74, she said:

> "72. In the balance of favour of extradition, I take account of these factors:
>
> - The offence is sufficiently serious to have attracted a very lengthy prison sentence, all of which remains to be served.
>
> - Although the offences took place some time ago, the delay has been caused by the fact that the offence was committee in North Macedonia by a Bulgarian national usually resident in Bulgaria. The authorities have had to use international assistance to search for (MRT), first in Bulgaria and subsequently in the UK.
>
> - (MRT) has been in the UK since April 2016 and her mother and son since May 2017, these are relatively short periods.
>
> - (T) has always been cared for by his maternal grandmother. This care has continued throughout his life, initially in Bulgaria and then in the UK. If (MRT) is extradited, (T) will continue to be cared for by a close family relative and one of his primary carers.
>
> - If (MRT's mother) decides to return to Bulgaria, she will be returning to a home which is familiar to (T).
>
> - (T) had not yet started primary school and his education is unlikely to suffer if he is returned to Bulgaria.

- (MRT) has previously left (T) voluntarily in the care of her mother.

73. In the balance for the requested person, I take account of these factors

- (MRT) has lived in the UK since 2016, her mother and son since May 2017. (MRT) has worked throughout this period. The family have lived at the same address throughout.

- (MRT) has committed no offences in this jurisdiction.

- (MRT) is not a fugitive from justice.

- A significant period of time has passed since the offences were committed.

- (MRT's) extradition would undoubtedly have an adverse impact upon (T). He would have to live without the care of his mother for a period. He would likely have to return to Bulgaria, causing disruption to any established routines

74. I have taken account of these competing considerations in order to determine whether the public interest in extradition outweighs the interference with the Article 8 rights of (MRT) and her family. In my judgement, the factors in the balance against extradition do not override the strong public interest in its favour. The offences are relatively serious, involving the use of skimming devices to copy data from bank cards which was subsequently used in numerous ATM transactions to withdraw cash, and have attracted a lengthy prison sentence in Macedonia. Although a significant period of time has passed since the offences were committed, the delay has primarily been caused by the difficulty faced by the Judicial Authority in locating (MRT) and her co-defendants, not least because they travelled from their home country of Bulgaria to North Macedonia to commit these offences. I have considered the impact of extradition on her son (T), and notwithstanding the undoubted adverse effect of extraction upon him, I have found that the impact will be mitigated by the factors ser out above. Taking account of all of the circumstances, I am satisfied that (MRT's) extradition remains proportionate and necessary."

25. Against that background she sent the case to the Secretary of State for a decision as to whether the Appellant should be extradited to North Macedonia.

Fresh Evidence

26. On behalf of the Appellant, her Counsel, Mr Malcolm Hawkes, seeks to rely on fresh evidence in support of this appeal.

27. S.104(4) of the Extradition 2003 Act provides that evidence may be admitted in support of an appeal where the following conditions are met:

> "(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 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."

28. Mr Hawkes seeks the admission of that evidence relying on CrimPR R50.20(6) CPD 50 C.6. In *Szombathely City Court v Fenyvesi* [2009] EWHC 231 (Admin), the Divisional Court held that evidence will not be admitted which should have been adduced before the District Judge, and that in order for evidence to be admitted the Court must be satisfied it would have resulted in the District Judge deciding the relevant question differently - in other words the evidence must be "*decisive*". Mr Hawkes submits that the evidence upon which he wishes to rely would indeed be decisive.

29. Mr Hawkes relies on a report of Dr Sharon Pettle, a consultant clinical psychologist. He submits that her findings "*significantly alter the Article 8 exercise in this case*." He summarises her conclusions in this way:

> "a. (T) is a vulnerable and anxious boy who displays very clear symptoms of Autistic Spectrum Disorder (ASD);
>
> b. His needs are currently very well addressed at his primary school, where he is progressing well. The school has taken a number of measures to address and compensate for his suspected ASD;
>
> c. He requires stability, familiarity and routine in his life, whether at home or at school, which he currently enjoys;
>
> d. His mother is his key attachment figure and primary carer; her extradition would be devastating for him; it would amount to a psychological blow from which he may not recover; mitigating measures are likely to be ineffective."

30. Mr Hawkes submits that there is strong and growing evidence that T has autism spectrum disorder ("ASD"), although he concedes that he has not yet formally been diagnosed with that condition. He points to Dr Pettle's screening tests which found T to be fearful, often nervous and easily scared. It is said that he loses confidence easily. He has a lack of "*imaginative play*" and focuses instead on order and

organisation. He shows "*signs of emotional and sensory dysregulation*". He is considered to be bright but lacks the social skills to play with other children. It is said that his progress is due in large part to his school's attention to his needs.

31. Mr Hawkes submits that T's father has had minimal involvement with his son. T knows his grandfather in Bulgaria but that is not a well-developed relationship. The grandfather is, in any event, in his mid-sixties and in poor health. He submits that his grandmother struggles to comfort T or provide for his needs. By contrast, T's relationship with his mother is very secure. He points out that Dr Pettle describes his mother as T's most significant relationship and his "*key attachment figure*". Mr Hawkes submits that whilst she did leave T with her mother in Bulgaria in 2016, she spoke at least twice daily by Skype to him and would return every two or three months for approximately 3 weeks at a time.

32. He points to Dr Pettle's conclusion that T:

> "is vulnerable and would be particularly harmed by any change in his home life; he is not resilient and is highly anxious but is more able and confident when his mother is nearby. He needs continuity and stability; his mother's extradition would lead to a direct set back in his progress at school and in his behaviour generally. It is doubted that, if extradited, anything approaching the level of contact the Appellant had with her son while voluntarily separated would be possible".

33. Dr Pettle went on to say that "*it would be impossible to prepare (T) for that level of separation*". Dr Pettle says there is "*a significant possibility that (T) would fall into depression*" and that his grandparents "*would encounter significant difficulties in trying to help him to cope with the devastating loss of his mother*." Dr Pettle concluded that she "*would anticipate that for (T), the severance of the relationship with his mother would create deep and profound damage from which he may never recover*".

34. Mr Hawkes submits that T has clearly identified vulnerabilities which are significant factors previously unconsidered in the Article 8 balancing exercise. Even without ASD he would be at risk of psychological harm if subjected to severance of contact with his mother for the duration of her prison sentence. Mr Hawkes argues that the fresh evidence is relevant to both grounds of appeal.

35. In response, Mr Payter says that the evidence emerging from Dr Pettle's meetings with the Appellant broadly mirror the evidence given to the Judge. He points out that the report of Dr Pettle demonstrates that T's behaviour had improved as a result of the work done by the school. He says that the reports "plainly articulates the risk to the Appellant's child but it does not demonstrate that the impact on him would be any worse than the Judge found". As a result, Mr Payter argues that Dr Pettle's report "cannot be said to be decisive such that had it been available it would have caused the Judge to reach a different decision".

36. I agreed to consider the fresh evidence de bene esse and I refer to it below. I will admit it if that consideration leads me to conclude it would be decisive.

The competing submissions: s.82 – passage of time

37. I deal first with the s.82 argument. The essential principles are not in dispute. They are neatly summarised in Mr Payter's skeleton.

38. Section 82, of the 2003 Act, bars the extradition of a person where it appears that it would be unjust or oppressive to extradite her because of the passage of time which has passed since she is alleged to have committed the extradition offence (in an accusation case), or since she is alleged to have become unlawfully at large (in a conviction case).

39. As Mr Hawkes submits, Lord Diplock provided what has become the established interpretation of 'unjust' and 'oppressive' in *Kakis v. Government of the Republic of Cyprus* [1978] 1 WLR, pp 782 – 783:

> "'Unjust' I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself, 'oppressive' as directed to hardship to the accused resulting from changes in his circumstances that have occurred during the period to be taken into consideration; but there is room for overlapping, and between them they would cover all cases where to return him would not be fair."

40. Lord Edmund-Davies observed, at 785 C-D, that:

> "the fact that the requesting government is shown to have been inexcusably dilatory in taking steps to bring the fugitive to justice may serve to establish both the injustice and the oppressiveness of making an order for his return …."

41. The tests of injustice and oppression are not be easily satisfied; oppression is more than mere hardship and whether the passage of time had made it unjust to extradite the fugitive depends upon whether a fair trial would be impossible. Council of Europe countries should readily be assumed capable of protecting an accused person against an unjust trial and the burden is on the defendant to establish the contrary: *Gomes & Goodyer v Government of the Republic of Trinidad and Tobago* [2009] UKHL 21; [2009] 1 WLR 1038 at §§31-37. The burden is on the requested person to establish oppression or injustice on a balance of probabilities: *Guven v HMP Brixton* [2005] EWHC 1391 (Admin); *Calder v The Public Prosecutor's Office of Landshut, Germany* [2006] EWHC (Admin); *Savicki v Netherlands* [2014] EWHC 3512 (Admin).

42. In deciding whether passage of time operates as a bar there is a balance to be struck between the seriousness of the offences and the consequences of the delay. In *Khan v Central Trial Court No 3 National High Court Spain* [2012] EWHC 3231, Silber J, sitting in the Divisional Court, said that:

> "It is clearly established that a critical factor determining whether to order extradition is the seriousness of the offences."

43. The mere fact of delay is unlikely in the clear majority of cases to justify a finding of oppression or injustice. The defendant must show something more: *Kila v Governor of HMP Brixton* [2004] EWHC 2824 (Admin). Although the passage of time bar is not a means of disciplining requesting territories for dilatoriness, culpable delay by the requesting authorities can be taken into account, but in borderline cases only: *Gomes* (supra) at §§27-28. Culpable delay can only arise when something ought to have been done quicker than it had been and there is no good explanation for why it had not. It is not easy to infer culpable delay from the mere passage of time, but the failure to take the most obvious steps in progressing the process can give rise to that inference: *Oreszczynsi v Poland* [2014] EWHC 4346 (Admin).

44. Against that background, Mr Hawkes submits the Appellant's extradition would be oppressive and unjust due to the passage of time since the alleged commission of the offence. He says the requesting state was guilty of culpable delay, the offending was significantly less serious than was suggested by the District Judge, and that the effects of extradition after this length of time would be profound on the Appellant and, more particularly, her son.

45. He says that the chronology demonstrates a failure by the requesting state to use the tools at the government's disposal to locate the Appellant. He points out that the Appellant was in hospital in the requesting state immediately after the alleged offending period for two days; her co-defendant, Radoslav was treated in hospital for two months. She spoke to the police who knew her name and nationality and they also knew the driver. Her home address in Lovech was registered with the authorities. Her father has never left that address.

46. The North Macedonian authorities did not issue a domestic arrest warrant until 7 July 2015 nor an international arrest warrant until 13 June 2016. Mr Hawkes says that there is no explanation as to why the North Macedonian government made no use of Interpol mechanisms, such as an Interpol Red or Blue notice or a country-specific wanted notice, when it learned in 2011 that the Bulgarian authorities were not able to serve the indictment on the Appellant. He says the Appellant was readily discoverable in Bulgaria at the very least from 15 September 2014 until her departure for the UK on 15 April 2016 and on the many occasions subsequently when she travelled between the two countries

47. Mr Hawkes argues that the judge was wrong to find that the government of North Macedonia not to be culpable for two reasons. First, because the requesting state is, he says, self-evidently at fault. Second, because, even absent culpable delay on the part of the North Macedonian government, the question for the court is, in circumstances where the Appellant is not to blame for any of the period of delay, whether her extradition in 2020 for conduct in 2010 in proceedings of which she knew nothing, would render her extradition in 2020 for the 2010 conduct either oppressive or unjust.

48. He argues that the particular amount obtained in the criminal act for which the Appellant was directly responsible was very modest indeed, some 7,800 MKD or about £106. He says the comparison with *Hatos and Iorga* was inapt; this was a much less serious case. Applying the sentencing guidelines, this offending would have attracted either a community penalty, or a very short custodial sentence. When

consideration is given to the likely impact of custody on family life, the former would have been much more likely than the latter.

49. He argues that the impact upon the Appellant and her family goes far beyond mere hardship. Referring to the evidence of Dr Pettle summarised above, he says the fact of his ASD means "*he is at very serious risk of significant, potentially irreversible psychological harm which cannot be ameliorated or mitigated sufficiently to render his mother's extradition proportionate*".

50. On the evidence now before the court, he submits that her conclusion on s.82 is unsustainable.

51. In response on s.82, Mr Payter submits that the Judge cannot be said to have been wrong to conclude that it would not be oppressive or unjust for the Appellant to be extradited. He says the Appellant's argument amounts to a recital of the factors that tended in favour of a finding of oppression and an impermissible attempt to re-litigate the Judge's factual findings and how the evidence should have been weighed.

52. As to delay, he submits that the District Judge had regard to the detailed further evidence served by the Respondent and concluded that "*the Government made efforts, using the international channels available to it, to locate her*".

53. As to the gravity of the offence, Mr Payter says, referring to *Celinski*, that there is no obligation to conduct a comparative sentencing exercise. He says the District Judge was right to view the Appellant's conduct as broadly similar, and should be categorised in the same way, as the appellants in *Hatos and Iorga*. He says the criticism of the District Judge for having regard to the further information from the Government as to allegations that have not resulted in conviction in the assessment of whether extradition would be oppressive or disproportionate is misplaced.

54. Mr Payter argues that the Judge had proper regard to the impact on the Appellant's son, accepting without qualification, that the imprisonment of a parent, especially a mother, will have a significant and adverse impact on the child. But she went on to identify the protective factors that would reduce the impact of extradition on him.

55. In relation to injustice, Mr Payter submits that the District Judge correctly identified that the case against the Appellant, who is entitled to a re-trial, is dependent on documentary evidence, the quality of which is not affected by the passage of time. The Appellant denies the offences and has provided an account of her actions at the relevant of time in 2010. It follows that the passage of time will not affect the fairness of any re-trial in North Macedonia. In addition, the Appellant served no evidence to overcome the presumption that she can have a fair trial in North Macedonia, a signatory to the ECHR and member of the Council of Europe.

Discussion: S.82

56. There are three relevant elements to the issue of oppression in this case: delay, gravity of the offence and the impact of the passage of time on the Appellant and her son.

Delay

57. In my judgment, the District Judge cannot be said to have been wrong in finding that the chronology does not demonstrate culpable delay on the part of the North Macedonian Government. Within a year of the offence, the North Macedonian authorities had decided to prosecute. That is beyond criticism. A month thereafter, the Government had asked the Appellant's home country, Bulgaria, to serve an indictment on her. Real efforts were made to serve that indictment in Bulgaria between 2011 and 2014. North Macedonia received little information relating to the whereabouts of the three defendants in that period. The Bulgarian authorities had searched for the Appellant in an area known as Svishtov, an area in which the Appellant had lived between 2005 and 2006. It is, as Mr Payter remarks, unremarkable that the Bulgarian authorities searched for her there.

58. In any event, it is difficult to criticise the North Macedonian authorities for the locations in which Bulgaria attempted to search for one of its own citizens. There can be no real criticism of the North Macedonian authorities for the time spent trying to locate the Appellant given the obvious importance of making a defendant aware of impending criminal proceedings. When those efforts were exhausted, and it became clear she was not going to be traced, the decision was taken, on 25 September 2014, to prosecute her in her absence. That then happened within four months.

59. Thereafter, the North Macedonian authorities did not know where the Appellant was located. There can be little criticism of them, in my view, for the time taken to issue a domestic warrant (four months after the judgment became final and enforceable) and an international arrest warrant eleven months later. In my judgment, the District Judge cannot fairly be said to be wrong in her conclusions in this regard.

Seriousness

60. Similarly, in my judgment the District Judge cannot properly be faulted for her conclusion as to the seriousness of the alleged offending or the severity of the sentence.

61. The sort of close comparison carried out by Mr Hawkes between the sentence imposed in North Macedonia and that which the Appellant would have received for similar conduct here is, in my judgment, wholly unjustified. In *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25 Lord Judge said:

> "we must exercise caution not to impose our views about the seriousness of the offence or offences under consideration or the level of sentences or the arrangements for prisoner release which we are informed are likely to operate in the country seeking extradition. It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence…"

62. In *Celinski*, the Lord Chief Justice said:

> "It will therefore rarely be appropriate for the court in the UK to consider whether the sentence was very significantly different from what a UK court would have imposed, let alone to approach extradition issues by substituting its own view of what the appropriate sentence should have been."

63. In fact, the District Judge here did compare the 5-year sentence imposed *in absentia* in North Macedonia and what similar conduct might attract here. In my view, she was right to say that this was "*relatively serious*" offending. Her reference to *R v Hatos and Iorga*, a case which focused on the guideline for possession of articles used to commit fraud, was entirely appropriate. Whether an English court would have imposed precisely as severe a sentence as did the North Macedonian is not the point; there is certainly no requirement of equality of sentencing in determining extradition.

64. Mr Hawkes concentrates, to the exclusion of almost anything else, on the fact that the particular amount obtained in the criminal act for which the Appellant was directly responsible was very modest indeed, some 7,800 MKD or about £106. But that is grossly to understate the criminality for which the Appellant was, or was jointly, responsible. That particular episode was part of a course of conduct involving 100 successful illegal transactions. I accept Mr Payter's submission that the District Judge was entitled to take into account allegations that have not resulted in conviction. Here, they formed part of the same course of conduct that founded the basis of the conviction. The Appellant had an opportunity to put forward her explanation for it. In circumstances where the Appellant asserted that the conduct was not serious, it was proper for the District Judge to have regard to that information.

65. In my judgment, the comparison the District Judge drew with the CACD decision in *Hatos and Iorga* was a fair one. There is, in my judgment, no doubt that this case would have passed the custody threshold in an English court. That would be true even if she had only taken into account the withdrawals, attempted withdrawals and account balance checks for which the Appellant was convicted.

66. At [61] above, I set out part of the observation of Lord Judge on the potential significance in assessing oppression of the likely sentence had the matter been prosecuted in this country. The whole sentence reads as follows:

> "It certainly does not follow that extradition should be refused just because the sentencing court in this country would not order an immediate custodial sentence, however it would become relevant to the decision if the interests of a child or children might tip the sentencing scale here so as to reduce what would otherwise be an immediate custodial sentence in favour of a non-custodial sentence (including a suspended sentence)". (emphasis added)

67. That passage serves to underline the importance of considering the position of the children of a person whose extradition is sought when determining whether extradition would be oppressive, and that was plainly a matter of great importance in the present case. In my view, however, even the potential impact on T would not persuade an English criminal court that this was not offending for which immediate imprisonment was appropriate, especially given the role of his grandmother in his life.

68. In any event, as Mr Payter correctly observes, the North Macedonian court made it clear the sentence was more severe because the Appellant absented herself from the trial. She will be entitled to a re-trial on her return to North Macedonia and that particular feature will then be absent from the Court's consideration.

69. In the final analysis, the Judge was entitled to find the offence to be "*relatively serious*" for the reasons she gave. In those circumstances, the District Judge's approach to the seriousness of the offences is unimpeachable.

Impact of the passage of time on the appellant and her son

70. The District Judge recognised that since the alleged offending, the Appellant had established a new life in the UK and led a law-abiding life here. Extradition would cause upheaval for her and her son but first, she said, that was not an uncommon consequence of extradition, and second, it did not amount to oppression. She noted that the Appellant had settled in the UK and found employment and now had a son, T. She accepted "without qualification", that the imprisonment of his mother would have a significant and adverse impact on T.

71. She went on, however, to identify a number of protective factors which she summarised at paragraph 48c:

> "In summary, (T) will return to a familiar setting, his grandparents' home in Bulgaria, where he will continue to be cared for by his grandmother, a person who has cared for him since birth. (T) has lived in the UK for a relatively short period and is too young to have established strong ties here. He has not started school yet and his return to Bulgaria to start his school years will not have an impact on his education. This would not be the first time (T) has been left in the care of his grandmother, as his mother voluntarily left (him) in Bulgaria for over a year when she came to the UK to work."

72. In my judgment, she was undoubtedly entitled, on the material before her, to conclude that the fact that T would be returning to his grand-parents' home, where he would continue to be cared for by his grandmother, was a significant feature in considering whether extradition would amount to oppression.

73. In my view, that analysis is not significantly altered by the fresh evidence. Dr Pettle's report establishes that T is a vulnerable and anxious boy displaying symptoms of ASD. He has benefited from his current schooling and would continue to benefit if he remained at that school. His mother's extradition and imprisonment would amount to a substantial psychological blow to him.

74. Mr Hawkes also relies on Dr Pettle's report in respect of the factors that, in the District Judge's view, reduced the impact of extradition on T. He points to the age and health problems of T's grandfather and the difficulties his grandmother has in comforting him and providing for his needs. But it remains the case, as the District Judge found, that T would be able to return to a familiar setting, namely his grandparent's home in Bulgaria. He would continue there to be cared for by his grandmother involved in his care since his birth.

75. Mr Hawkes makes the point that whilst at the time of the District Judge's judgment, T had lived in the UK for only a short period and had not yet started school, he has now started school and would be greatly affected by being moved from it. However, the

District Judge's essential reasoning remains sound. As the District Judge pointed out at paragraph 48(iv):

> "(T) has strong links to Bulgaria where he lived until he was two and half years old. He speaks the Bulgarian language fluently. This would not be the first time that (T) has been left in the care of his grandmother, even if the circumstances are somewhat different."

All that remains true.

76. In reaching her conclusions about s.82, the District Judge properly had regard to the period of time that had passed since the commission of the offence, the seriousness of the offence and the effect of delay on the Appellant and her son. In those circumstances, she was not wrong to conclude that the test of oppression was not satisfied. In my view, none of that changes significantly in the light of the proposed new evidence.

77. Nor, in my judgment, can the District Judge be criticised for her conclusion that extradition would not be unjust. She correctly had regard to the nature of the offence and the evidence that would be necessary to establish it at trial. As Mr Payter correctly submits, the Appellant is entitled to a re-trial on return to North Macedonia and there was nothing to suggest that she would not receive a fair trial in North Macedonia, a signatory to the ECHR and a member of the Council of Europe. That being so, I reject the submission that extradition to face such a trial would be unjust.

78. In those circumstances, the s.82 challenge must fail.

Competing submissions: s.87 and Article 8 ECHR

79. Mr Hawkes submits that the Article 8 balancing exercise ought to have led the District Judge to find for the Appellant on the material before her. But, he says, even if that is not right, the balance has swung overwhelmingly in favour of refusing extradition given the evidence of Dr Pettle. It was on this issue that much of Mr Hawkes' submissions were focused. He says that Dr Pettle's report, as summarised above, makes a decisive difference in his client's favour on Article 8.

80. Mr Payter submits that the District Judge was entitled to find that there was a cogent plan for the care of the Appellant's son, which is for him to live with his maternal grandmother who lives in the UK at present. This is not, he says, a "classic sole carer" case. The Judge found that the grandmother was her grandson's sole carer in Bulgaria between April 2016 and May 2017 (which was the period when the Appellant moved to the UK) and that the grandmother moved to the UK to provide care to him while the Appellant worked. The Judge found that his grandmother was "one of his primary carers", that his education was unlikely to be significantly disrupted and that if she returned to Bulgaria, his grandfather would provide his grandson with emotional support. The information from the Respondent also detailed the availability of means of contact for prisoners and their children.

81. He says the fresh evidence does not detract from the essential reasoning of the District Judge.

Discussion: Article 8

82. In *Norris v USA*, the Supreme Court held that when considering whether extradition constituted an interference with an individual's rights under Article 8 the Court should not consider whether the circumstances were exceptional but should instead consider whether the consequences were exceptionally serious.

83. *Norris* was considered by the Supreme Court in *HH* [2012] UKSC 25. At paragraph 8 of her judgment in that case, in a passage that has become the litmus test for articles 8 cases in extradition law, Lady Hale drew the following, oft cited, conclusions from *Norris*:

> "(1) There may be a closer analogy between extradition and the domestic criminal process than between extradition and deportation or expulsion, but the court has still to examine carefully the way in which it will interfere with family life.
>
> (2) There is no test of exceptionality in either context.
>
> (3) The question is always whether the interference with the private and family lives of the extraditee and other members of his family is outweighed by the public interest in extradition.
>
> (4) There is a constant and weighty public interest in extradition: that people accused of crimes should be brought to trial; that people convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries; and that there should be no "safe havens" to which either can flee in the belief that they will not be sent back.
>
> (5) That public interest will always carry great weight, but the weight to be attached to it in the particular case does vary according to the nature and seriousness of the crime or crimes involved.
>
> (6) The delay since the crimes were committed may both diminish the weight to be attached to the public interest and increase the impact upon private and family life.
>
> (7) Hence it is likely that the public interest in extradition will outweigh the article 8 rights of the family unless the consequences of the interference with family life will be exceptionally severe."

84. The central question, for the District Judge and the now for this Court, is whether the interference with the private and family lives of the Appellant and other members of her family, notably her son, is outweighed by the public interest in extradition. On the one side of the scales in that weighing exercise are the matters Lady Hale referred to in sub-paragraph (4). These are all familiar considerations, most of which apply in most extradition cases. But the frequency with which they apply should never lead to

their importance being underestimated. That those accused of crimes should be brought to trial; that those convicted of crimes should serve their sentences; that the United Kingdom should honour its treaty obligations to other countries are substantial weights in the scales in favour of extradition in this, as in almost every extradition case. Whatever the crime those are significant considerations.

85. The particular weight to be attached to the offences in question varies according to the seriousness of the crime. The offences here were, as the District Judge found and I accept, "*relatively serious*". There has been substantial delay here between the commission of the crime and the order for extradition and delay affects both sides of the equation, diminishing the weight to be attached to the public interest in extradition and increasing the weight to be attached to private and family life. However, the public interest in extradition will frequently outweigh Article 8 rights unless the consequence of the interference with family life is exceptionally severe.

86. The crucial issues, therefore, in respect of Article 8 are whether the District Judge erred in the weight to be attached to the rights of the Appellant and her son or whether the fresh evidence on those issues would, if admitted, change the outcome.

87. The starting point of the District Judge's analysis was her recognition that imprisonment of a mother would have a significant and adverse impact on the child. She accepted that that significantly strengthened the Appellant's Article 8 submissions. T would have to live without the care of his mother for a period. In my judgment, Dr Pettle's description of T's condition strengthens still further the Article 8 case that the Appellant is able to make.

88. However, as the District Judge correctly observed in paragraph 66: "*The interests of children are not necessarily the paramount consideration and although a primary consideration, they are not always the only primary consideration.*" As Mr Patyer correctly submits, this is not a "*classic sole carer*" case because of the role past, present and future of T's grandmother. In my view, the District Judge approached the *Celinski* balancing exercise correctly and came to a conclusion on the material before her that was properly open to her.

89. Furthermore, it is my firm view that whilst Dr Pettle's report serves to emphasize, underline and expand upon the likely effect of the Appellant's extradition on T, it does not fundamentally change the calculus. For all the reasons discussed above, the essential analysis of the District Judge remains sound. Whilst the weight on the Appellant's side of the scale is increased by the fresh evidence, it does not produce a significant change in the balance. The seven factors in favour of extradition listed in the quotation from the judgment recorded at [24] above remain relevant and potent. The five factors in the Appellant's favour there set out all remain relevant and the last of them is given added weight by Dr Pettle. But, in my judgment, taking all those factors into consideration, the District Judge's conclusion cannot be said to be wrong.

90. In those circumstances, Dr Pettle's report is not decisive. Applying *Fenyvesi,* her report is not admissible. In those circumstances, this ground must be rejected.

Conclusions

91. The fresh evidence is not "decisive" and accordingly is not admitted. Both grounds of appeal are rejected, and this appeal fails.