Neutral Citation Number: [2023] EWHC 2830 (Admin)

CO/4192/2022; AC-2022-LON-003159

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/11/2023

Before

MR JUSTICE SWIFT

- -

Between

VJACESLAVS VASCENKOVS **Appellant**

-and-

PROSECUTOR GENERAL'S OFFICE, REPUBLIC OF LATVIA **Respondent**

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- -

Helen Malcolm KC, Stefan Hyman (instructed by **ITN Solicitors**) for the **Appellant**
Amanda Bostock (instructed by **Crown Prosecution Service** (**CPS**) for the **Respondent**

Hearing date: 11 October 2023

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Approved Judgment

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MR JUSTICE SWIFT

A. Introduction

1. Vjaceslavs Vascenkovs appeals against an extradition order made on 7 November 2022. The order rests on a warrant issued on 17 November 2021 and certified by the National Crime Agency on 20 January 2022. The warrant is an accusation warrant. The allegation against Mr Vascenkovs is that in March 2017 he provided false information on an application for unemployment benefit. It is alleged he claimed benefits amounting to €6,365.40. The warrant requests Mr Vascenkovs' surrender for trial for an offence under section 177(1) of the Latvian Criminal Code. The maximum sentence on conviction of an offence under that section is 3 years.

2. Two grounds of appeal are pursued. The first ground is that extradition would be a disproportionate interference with Mr Vascenkovs' ECHR article 8 rights. The second ground is that extradition would be disproportionate – i.e., that the bar to extradition at section 21A(1)(b) of the Extradition Act 2003 ("the 2003 Act") applies. Further, by an Application Notice dated 26 July 2023, Mr Vascenkovs seeks permission to add a further ground of appeal, that by reason of prison conditions in Latvia, extradition would expose him to a real risk of article 3 ill-treatment.

B. Decision. The article 8 and section 21A grounds of appeal.

3. On the facts of this case, the article 8 and section 21A grounds of appeal significantly overlap. The main plank of the case that extradition would be a disproportionate interference with the article 8 right to private and family life the contention is that the extradition offence is not a serious offence. This submission is the necessary consequence of the fact that Mr Vascenkovs' private and family life in the United Kingdom is relatively slight. He arrived in the United Kingdom in April 2020 and has been in work since then, first employed at a warehouse and more recently in a food processing business. He has no dependents in the United Kingdom. He has a partner, but that relationship is relatively recent, they met in May 2022.

(1) The section 21A ground of appeal

4. Section 21A(1)(b) of the 2003 Act requires the court to consider "whether the extradition would be disproportionate". For this purpose, the court is required, so far as appropriate, to take account of matters set out in subsection (3), but prohibited from taking account of any other matters. Subsection (3) is as follows:

> "(3) These are the specified matters relating to proportionality —
>
> (a) the seriousness of the conduct alleged to constitute the extradition offence;
>
> (b) the likely penalty that would be imposed if [the requested person] was found guilty of the extradition offence;

> (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of [the requested person]."

If the court concludes that extradition would be disproportionate it must order the requested person be discharged.

5. Section 21A was added to the 2003 Act by amendment made by section 157 of the Anti-Social Behaviour, Crime and Policing Act 2014. The place of proportionality in the European Arrest Warrant system established by Council Framework Decision 2002/584/JHA ("the Framework Decision"), had previously been considered by Sir Scott Baker in his 2011 "Review of the United Kingdom's Extradition Arrangements". The Review had considered the merits of proportionality requirements that might be imposed both on the issuing state authority (i.e., to apply a proportionality test at the time the decision to issue the warrant was made) and on the executing judicial authority (i.e., to apply a proportionality test when deciding whether to order surrender). As to the former, the conclusion in the Review was that it was a matter that had to be addressed, if at all, by revision to the Framework Decision. The Review contained no recommendation on the latter. All this was noted in the government response to the Review published in October 2012. The genesis of the amendment made by the 2014 Act was a statement by the Home Secretary in Parliament on 9 July 2013 which referred to occasions when extradition warrants had been "issued disproportionately for very minor offences". The amendment that became section 21A was introduced in Parliament on 16 July 2013. Section 21A came into effect on 21 July 2014.

6. At the same time, section 2(7A) was also inserted into the 2003 Act.

> "(7A) But in the case of a Part 1 [accusation] warrant … the designated authority must not issue a certificate under this section if it is clear to the designated authority that a judge proceeding under section 21A would be required to order the person's discharge on the basis that extradition would be disproportionate. In deciding that question, the designated authority must apply any general guidance issued for the purposes of this subsection."

This provision, applicable only when a Part 1 warrant is an accusation warrant, applies a section 21A notion of proportionality to the exercise of deciding whether or not a warrant should be certified, the decision that first permits the warrant to be executed in the United Kingdom.

7. On 23 July 2014 Lord Thomas CJ issued the *Practice Direction (Criminal Proceedings: Various Changes)* [2014] 1 WLR 3001. One part of the Practice Direction concerned the application of 21A of the 2003 Act. Paragraphs 17A.2 to 17A.4 provided as follows:

> "*General guidance under section 2(7A) of the Extradition Act 2003 (as inserted by section 157(3) of the Anti-social Behaviour, Crime and Policing Act 2014)*
>
> 17A.2 When proceeding under section 21A of the Act (inserted by section 157(2) of the 2014 Act) and considering under subsection (3)(a) of the Act the seriousness of the conduct alleged to constitute the extradition offence, the judge will determine the issue on the facts of each case as set out in the warrant, subject to the guidance in 17A.3 below.
>
> 17A.3 In any case where the conduct alleged to constitute the offence falls into one of the categories in the table at 17A.5 below, unless there are exceptional circumstances, the judge should generally determine that extradition would be disproportionate. It would follow under the terms of section 21A(4)(b) of the Act that the judge must order the person's discharge.
>
> 17A.4 The exceptional circumstances referred to above in 17A.3 will include: (i) vulnerable victim; (ii) crime committed against someone because of their disability, gender-identity, race, religion or belief, or sexual orientation; (iii) significant premeditation; (iv) multiple counts; (v) extradition also sought for another offence; (vi) previous offending history."

The table of offences at paragraph 17A.5 identified 5 categories of offence: "minor theft (not robbery/burglary or theft from the person)"; "minor financial offences (forgery, fraud and tax offences)"; "minor road traffic, driving and related offences"; and "minor public order offences". Each category was then further described.

8. This part of the Practice Direction (which is now at paragraph 12.2 of the Criminal Practice Directions 2023) was considered by the Divisional Court in *Miraszewski v District Court in Torun*, *Poland* [2015] 1 WLR 3929. In his judgment in that case, Pitchford LJ stated as follows:

> "26. … The Lord Chief Justice's practice direction … applies both to certification and to extradition decisions made on and after 6 October 2014. Its statutory purpose is to guide the decision-maker whose task it is to issue a certificate under section 2(7). However, the Lord Chief Justice could hardly give that guidance unless, at the same time, he informed judges of the threshold of triviality. Although the guidance, as addressed to judges, is in places couched in mandatory terms, paragraph 17A.2 and following are explicitly guidance only.
>
> 27. The parties are agreed that the practice direction is necessarily limited by its statutory authority, and, in my view, that is an appropriate agreement. The judge will be applying the statutory factor of seriousness as a component of the judgment

of proportionality, but the guidance provides a measure of assistance to the assessment of seriousness. There is a compelling practical reason why the designated authority should be cautious before making a decision to refuse a certificate under section 2(7A). It would be procedurally undesirable for the focus of attention in such cases to become the rationality of the certification decision in claims for judicial review rather than the testing of the merits of the proportionality issue through the normal statutory hearing and appeal process. This may be one explanation for the very low threshold of seriousness identified in the guidance to the designated authority.

28. I accept the submission made by Mr Fitzgerald QC on behalf of the appellants that it is appropriate for judges to approach the Lord Chief Justice's guidance as identifying a floor rather than a ceiling for the assessment of seriousness. The test for the designated authority is whether "it is clear … that a judge proceeding under section 21A would be required to order the person's discharge on the basis that extradition would be disproportionate". The Lord Chief Justice's guidance is, it seems to me, deliberately aimed at offences at the very bottom end of the scale of seriousness about which it is unlikely there could be any dispute. It must be so, otherwise the judge's freedom to apply the statutory criteria of proportionality would be unlawfully fettered. The guidance states that in the identified cases the triviality of the conduct alleged would *alone* require the judge to discharge the requested person. Subject to the exceptional circumstances identified in paragraph 17A.4, the NCA's decision-maker can assume that the judge *would be required to discharge* the requested person if he is sought for an extradition offence in one of the categories listed. However, a judge making the proportionality decision is not limited by these categories. He may conclude that an offence is not serious even though it does not fall within the categories listed in the guidance. If so, the proportionality decision may depend on the paragraph (b) or (c) factors. It is noticeable, for example, that none of the offences of violence to the person, even the least serious, is captured by the guidance, but the terms of paragraph 17A.2 ("the judge will determine the issue on the facts of each case as set out in the warrant, subject to the guidance in 17A.3 below") make it clear that other offences may be assessed by the judge as being non-serious or trivial offences. Further, the fact that one of the paragraph 17A.4 defined "exceptional circumstances" applies, causing the NCA to certify the EAW, does not preclude the judge from holding that extradition would be disproportionate. The judge has responsibility for weighing relevant factors for himself."

9. In his judgment, Pitchford LJ also commented on each of the section 21A(3) "specified matters". The overall tenor of his remarks was to discourage enquiries being made of the requesting judicial authority. He considered that:

> "36. … the seriousness of conduct alleged to constitute the offence is to be judged, in the first instance, against domestic standards although, as in all cases of extradition, the court will respect the views of the requesting state if they are offered … the main components of the seriousness of conduct are the nature and quality of the acts alleged, the requested person's culpability for those acts and the harm caused to the victim. I would not expect a judge to adjourn to seek the requesting state's views on the subject."

So far as concerns likely penalty (section 21A(3)(b)), he considered it would be at odds with the notion of mutual recognition and the need for reasonable expedition for a judge in every case, to require the requesting authority to provide evidence of likely penalty. He continued:

> "38. … the broad terms of subsection 3(b) permit the judge to make the assessment on the information provided, and when specific information from the requesting state is absent, he is entitled to draw inferences contents of the EAW and to apply domestic sentencing practice as a measure of likelihood."

He also commented that the likelihood of a non-custodial penalty following conviction would not preclude a conclusion that extradition would be proportionate:

> "39. … if an offence is serious the court will recognise and give effect to the public interest in prosecution".

10. I consider the position in light of the judgment in *Miraszewski* to be this. Section 21A(1)(b) and (3) establish a bespoke notion of proportionality which is a condition for extradition pursuant to an accusation warrant. The Practice Direction contains guidance on seriousness but is not exhaustive and does not remove the court's responsibility to apply its own assessment of this notion of proportionality. The proportionality assessment required is an overall appreciation of a situation rather than an exercise of precise calibration. While information offered by a requesting judicial authority may be considered, the court is under no obligation to request information and such requests will be relatively rare. In most instances a court will apply this proportionality requirement using domestic practice as a measure. Resort to domestic practice is inevitable since even if an English court were to be equipped with information from the requesting judicial authority it would, from the perspective of the principle of mutual recognition, ill-behove it to subject that information to anything approaching penetrating analysis. Moreover, the same principle of mutual recognition requires, so far as this proportionality analysis rests on consideration of domestic practice, the court should allow a significant margin before concluding extradition would be disproportionate, since reaching such a conclusion too readily could call into question the requesting authority's decision to issue the warrant (as a

disproportionate use of that court's power). A conclusion that extradition would be disproportionate would not necessarily be at odds with the notion of mutual recognition. For example, it might rest on information not available to the requesting authority when it made its decision to issue the warrant. However, the principle of mutual recognition means that a conclusion that extradition is disproportionate in this sense will be an occurrence more rare than common, likely to arise only in unusual circumstances.

11. Putting the matter another way, the judgment *Miraszewski* does not suggest that the bar on extradition contained within section 21A(1)(b) exists to pursue a purpose that goes any further than explained by the Home Secretary in her statement in parliament in July 2013 and the statement by the Home Office Minister made when the amendment was introduced (see, the judgment in *Miraszewski* at paragraph 30): i.e., to provide a further brake on extradition for "very minor offences". A further brake because the definition of extradition offence in section 64 of the 2003 Act already excludes the possibility of extradition for some types of minor offending.

12. The first submission made by Ms Malcolm KC, for Mr Vascenkovs, is that matters have now moved on. She submits that the provisions in the Trade and Co-operation Agreement relating to extradition, which since 31 December 2020 comprise the international law framework for extradition between the United Kingdom and EU Member States in substitution for the Framework Decision, have caused something of a sea change.

13. The provisions on extradition are in Title VII of Part 3 of the Trade and Cooperation Agreement. Mr Vascenkovs draws attention to article 597 headed "*Principle of Proportionality*" and article 613 headed "*Surrender Decision*":

> "Article 597
> Principle of Proportionality
>
> Cooperation through the arrest warrant shall be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person particularly with a view to avoiding unnecessarily long periods of pre-trial detention.
>
> …
>
> Article 613
> Surrender decision
>
> 1. The executing judicial authority shall decide whether the person is to be surrendered within the time limits and in accordance with the conditions defined in this Title, in particular the principle of proportionality as set out in Article 597.

> 2. If the executing judicial authority finds the information communicated by the issuing State to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to Article 597, Articles 600 to 602, Article 604 and Article 606, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits provided for in Article 615.
>
> 3. The issuing judicial authority may forward any additional useful information to the executing judicial authority at any time."

There is no direct equivalent to article 597 in the Framework Decision. As for article 613(1), a comparison with article 15(1) of the Framework Decision (also headed "Surrender Decision") reveals no reference there to proportionality.

14. Ms Malcolm's submission emphasises that it is clear from article 597 itself and from the final words of article 613(1) that a principle of proportionality formulated in terms similar to section 21A(1)(b), (2) and (3) is now *a*, if not *the* guiding principle in the arrangements for extradition between the United Kingdom and EU Member States. She relies on the judgment of Sir Ross Cranston in *Dujka v Czech Republic* [2023] EWHC 1842 (Admin). At paragraph 22, referring to articles 597 and 613, Sir Ross observed that "concern with proportionality has been enhanced following Brexit". Ms Malcolm's conclusion is that the contrast in approach between the Framework Decision and the provisions now in the Trade and Co-operation Agreement means that Pitchford's LJ comment in *Miraszewski* must be revisited. She submits that the practical consequence is that the court should now be more willing than previously to seek information from requesting judicial authorities to undertake the section 21A(1)(b) proportionality analysis.

15. So far as concerns the present case, her submission is that the District Judge ought to have asked the Latvian judicial authority for further information on the likelihood that, in the event of conviction, a custodial sentence would be imposed on Mr. Vascenkovs. This was, Ms Malcolm submitted, because the present case is on its facts, a case where extradition would be borderline disproportionate because it is in respect of alleged offending which, had it been committed in England, would probably not have attracted a custodial penalty. Ms Malcolm also criticised the District Judge's reasoning so far as it concerned how similar offending occurring in England might be sentenced.

16. I do not accept the submission that the Trade and Co-operation Agreement requires a new approach to be taken to section 21A(1)(b) proportionality. To state the obvious, section 21A(1)(b) itself has not changed. Nor can it be said that the section should be construed in conformity with Part 3, Title VII of the Trade and Co-operation Agreement, since the latter post-dates the former. But even if that were not so, the position does not change. The formulation of the proportionality principle in article 597 is different: it includes the criteria listed at section 21(A)(3) of the 2003 Act, and also refers to "… taking into account the rights of the requested person and the interests of the victims". The article 597 principle of proportionality is therefore

distinct from (and wider than) the notion of proportionality in section 21A(1)(b) of the 2003 Act.

17. Ms Malcolm's submission is that there is a subtle distinction between the provisions in the Framework Decision and those in Title VII of the Trade and Co-operation Agreement, that supports the conclusion that the wide margin of appreciation described by Pitchford LJ in his judgment in *Miraszewski,* has gone and that now the section 21A(1)(b) proportionality bar requires a close or at least closer than to date applied, level of scrutiny. She submits that scrutiny must pay careful attention to the sentence the requesting judicial authority would be likely to impose on conviction, and that English courts should be more willing to seek further information on sentencing practice in the requesting state and what that might mean for any sentence that might be imposed on the requested person in the event of conviction.

18. I do not consider that comparison between the provisions for extradition under the Framework Decision and those now in place under Title VII in the Trade and Co-operation Agreement demonstrates any material difference between them, or demonstrates that any different approach is required following the move from extradition pursuant to the former to extradition pursuant to the latter. The point often cited in favour of the conclusion that there is a material difference, is the absence of any provision in the Framework Decision requiring the requesting judicial authority to consider whether it is proportionate to issue a warrant. There is no such provision, but that is less significant than it might seem. One consideration is that article 2 of the Framework Decision permits a warrant to be issued only if the offence in issue is in principle punishable by a custodial sentence of at least 12 months (a requirement reflected in the definition of extradition offence at section 64 of the 2003 Act). That provides some safeguard against disproportionate decisions to issue warrants. The more important matter is the general principle of EU law that EU law powers be used proportionately. This requirement is reflected at paragraph 2.4 of the 2017 European Arrest Warrant Handbook issued by the EU Commission.

> "**2.4 Proportionality**
>
> An EAW should always be proportional to its aim. Even where the circumstances of the case fall within the scope of Article 2(1) of the Framework Decision on EAW, issuing judicial authorities are advised to consider whether issuing an EAW is justified in a particular case.
>
> Considering the severe consequences that execution of an EAW has on the requested person's liberty and the restrictions of free movement, the issuing judicial authorities should consider a number of factors in order to determine issuing an EAW is justified.
>
> In particular the following factors could be taken into account:
>
> (a) the seriousness of the offence (for example, the harm or danger it has caused):

> (b) the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence);
>
> (c) the likelihood of detention of the person in the issuing Member State after surrender;
>
> (d) the interests of the victims of the offence.
>
> Furthermore, issuing judicial authorities should consider whether other cooperation measures could be used instead of issuing an EAW. Other Union legal instruments on judicial cooperation in criminal matters provide for other measures that in many situations, are effective but less coercive …"

This is the premise for the point made later in the Handbook at paragraph 5.7:

> "**5.7 Proportionality – the role of the Executing Member State**
>
> The Framework Decision on the EAW does not provide for the possibility of evaluation of the proportionality of an EAW by the executing Member State. This is in line with the principle of mutual recognition. Should serious concerns on the proportionality of the received EAW arise in the executing Member State, the issuing and executing judicial authorities are encouraged to enter into direct communication. It is anticipated that such cases would arise only in exceptional circumstances. With consultation, the competent judicial authorities may be able to find a more suitable solution … For example, depending on the circumstances of the case, it might be possible to withdraw the EAW and use other measures provided under national law or Union law."

Put another way, the Handbook explains the absence in the Framework Decision of reference to proportionality testing by the executing judicial authority: proportionality has been addressed at the time the warrant was issued by the issuing judicial authority; when the warrant is before the executing judicial authority, the emphasis turns to the principle of mutual recognition but that does not prevent the executing authority requesting further information from the requesting authority in a suitable case.

19. In substance, the position now under the Trade and Co-operation Agreement is little different. Article 596 describes an extradition system between the EU Member States and the United Kingdom "based on a mechanism of surrender pursuant to an arrest warrant". The requirement at article 597 is that the "cooperation through the arrest warrant shall be necessary and proportionate …". The notion of proportionality is overarching. It attaches to decisions of the issuing judicial authority to issue the warrant and of the executing judicial authority to act upon the warrant. It also applies

to the general obligation of cooperation. In this way the notion of "proportionate cooperation" under the Trade Co-operation Agreement performs a function not dissimilar to the function performed by the notion of mutual recognition under the Framework Decision. While it will always be possible to argue that a difference in terminology ought to produce some difference in practice, there is little if anything in the remainder of Title VII to suggest that the Trade and Co-operation Agreement was intended to give (or has given) effect to a major variation to the extradition arrangements previously in place under the Framework Decision.

20. Moreover, there is little else in the Trade and Co-operation Agreement that can identify any principled difference to the approach to section 21A(1)(b) proportionality. Ms Malcolm also referred me to the Joint Political Declaration on Title VII. The Declaration was published at the time the Trade and Co-operation Agreement was made. There is nothing in the Declaration that alters the conclusions I have reached. The material part is as follows:

> "[the] Principle of Proportionality of Title VII … provides that cooperation on surrender must be necessary and proportionate, taking into account the rights of the requested person and the interests of the victims, and having regard to the seriousness of the act, the likely penalty that would be imposed and the possibility of a State taking measures less coercive than the surrender of the requested person, particularly with a view to avoiding unnecessarily long periods of pre-trial detention.
>
> The principle of proportionality is relevant throughout the process leading to the surrender decision set out in Title VII … Where the executing judicial authority has concerns about the principles of proportionality, it shall request the necessary supplementary information to enable the issuing judicial authority to set out its views on the application to the principle of proportionality."

There is nothing in that declaration that is inconsistent with any of the points set out by Pitchford LJ in his judgment in *Miraszewski.*

21. In the present case, the District Judge applied section 21A(1)(b) taking account of the material part of the Criminal Practice Directions and the guidance given by Pitchford LJ in *Miraszewski.* She considered English sentencing practice for the English law offences that the allegations made against Mr Vascenkovs in Latvia might comprise had the same acts been done in England. The relevant offences were under section 111A of the Social Security Administration Act 1992 (dishonestly making a false representation to obtain a benefit), and section 112 of the same Act (making a false representation to obtain a benefit). She continued as follows:

> "39 … both advocates accepted that if the value of the fraud alleged was exchanged to UK pounds sterling, the value of the offence would be a little over £5,000. There is also no dispute between the [judicial authority] and [counsel for Mr Vascenkovs], if the UK offence [is the offence under section

112 of the 1992 Act] the starting point for the offence on the information available is likely to be a community penalty.

40. [The judicial authority] submitted if the UK offence [was the offence under section 111A of the 1992 Act], considering that it was a sophisticated offence which is fraudulent from the outset and does not fall squarely within low or medium culpability in the UK guidelines, the starting point sentencing in the UK would be at least 36 weeks imprisonment without the aggravating feature of the [requested person's] conviction for robbery. [Counsel for Mr Vascenkovs] disagreed, he submitted that even if the section 111A offence were to be considered, the offence fell within medium culpability for those guidelines and the starting point is, a community penalty in the United Kingdom.

41. I find the offence is one which [is] capable of being considered under section 111A [of the 1992 Act]. The [warrant] stated that [Mr Vascenkovs] provided false information about his employment history being aware that he was not employed by the company he stated that employed him. He also made false declarations about the salary he received. He did this on two separate dates in March 2017. [Counsel for the judicial authority] submitted the offences sophisticated so it specifically falls within high culpability when applying the UK sentencing guidelines section 111A offences. [It] does not fall in lower culpability. Medium culpability excludes those matters where the claim is fraudulent from the outset, as alleged in this instance.

42. [Counsel for Mr Vascenkovs] argued the [offending] fell within medium culpability of the section 111A guidelines because [it] did not meet the factors listed in high culpability. There is no suggestion of group activity, involvement of others or abuse of his position nor is the offence sophisticated. It did not involve significant planning. [Mr Vascenkovs] filled out a form with false information. He submitted the conduct in the [warrant] fell between high and low culpability and is therefore medium culpability, which is expressly provided for in the medium culpability bracket. I disagree. I find the offence can amount to significant planning. [Counsel for Mr Vascenkovs] submitted a claim that is fraudulent from the outset, requiring submission of information on two separate occasions to two separate state agencies and the conduct alleged can fall within the high culpability bracket. I find, if sentenced in the UK, it will be aggravated by the previous conviction for robbery for which [Mr Vascenkovs] was released just one year before the date of the offence on the [warrant]. I find the offences so serious that [Mr Vascenkovs] would likely face a custodial sentence in Latvia if convicted. "

22. The submission for Mr Vascenkovs is in two parts: *first*, that the District Judge wrongly applied the Sentencing Council's Guideline for the section 111A offence; and *second*, that she ought not to have decided the proportionality issue without information from the Latvian judicial authority on whether it was likely that a custodial penalty would be imposed on Mr Vascenkovs in the event of conviction.

23. The Sentencing Council Guideline provides a sentencing range by reference to culpability and harm. No point arises so far as concerns harm which is measured by the reference to the value obtained or intended to be obtained. The submission on culpability is that the District Judge was wrong to conclude the allegation against Mr Vascenkovs was in the "high culpability" bracket because the conduct described in the warrant did not entail anything comprising "significant planning" which is the relevant rubric contained in the Sentencing Council Guideline. If the offending was not high culpability it would not, given the amount involved, attract a custodial sentence as the starting point.

24. I do not consider this submission assists. Any resort to the Sentencing Council Guidelines to consider the type of sentence that might be imposed for similar offending in England is undertaken only to obtain a general idea of the seriousness of the allegation and the likely consequence of conviction. It is a hypothetical exercise. A district judge is not in a position to undertake the sort of precise sentencing exercise that would be performed following a trial. There has been no trial and the precise circumstances of the offending and of the accused when the offending took place are not known. Given the absence of this information the conclusion reached by the District Judge at paragraph 42 was an appropriate conclusion. The task for this court, on appeal, is not to mark the judge's approach to a sentencing exercise as if she had passed sentence following trial and this appeal court was acting as the Court of Appeal Criminal Division. There is no need to determine matters of fine detail when resort is had to the Sentencing Council Guidelines for this purpose. On appeal, the only issue is whether the approach taken to the hypothetical application of the Guidelines was one that, in broad terms, was appropriate and fitted with a correct assessment of proportionality for the purposes of section 21A of the 2003 Act. I am satisfied that the District Judge used the Guidelines correctly. I do not consider that the conclusions she reached both as to the likely outcome had the same matters happened in England or as to the likely outcome for Mr Vascenkovs in the event of conviction, should be reversed.

25. The second submission for Mr Vascenkovs is that in "borderline cases" (i.e. cases where the sentence of an English court for like offending could be either custodial or non-custodial) a court must, before deciding the section 21A(1)(b) proportionality question, ask the requesting judicial authority whether it would impose a custodial sentence. This, it was submitted, is a "hard-edged" requirement.

26. I do not agree. A hard-edged requirement would be arbitrary, and would be wrong in principle. It would arbitrary because, as I have already said, the Sentencing Council Guidelines are applied in this context without the full facts that would ordinarily be available to a sentencing court. A hard-edged rule would be wrong in principle because were requests to be made as a matter of course, that would tend to undermine the principle of proportionate co-operation in article 597 of the Trade and Co-

operation Agreement. Asking a requesting judicial authority for an indication of likely penalty in a specific case tends to place that judicial authority in a difficult position. Any judicial authority will understandably be reluctant to risk pre-empting what might emerge at trial relevant to sentence or what might emerge in the course of a post-conviction sentencing process. A hard-edged rule is also wrong in principle because it does not sit well with article 613(2) of the Trade and Co-operation Agreement. That permits the executing judicial authority to request further information, including on an issue concerning the application of article 597, stating

> "If the executing judicial authority finds the information communicated by the issuing State to be insufficient to allow it to decide on surrender …"

Whether and if so what request is appropriate is a matter for the judgement and discretion of the executing court.

27. Overall, there is no reason why the position ought not to remain as described by Pitchford LJ in *Miraszewski* at paragraph 38.

28. Returning to the circumstances of the present case I do not consider the District Judge committed any error in not requesting information from the Latvian judicial authority on the likely sentence that would be imposed in the event of conviction. The District Judge concluded she had sufficient information to apply section 21A(1)(b). She was correct to do so. (Had the District Judge considered she did not have sufficient information she ought, as anticipated by article 613(2) of the Trade and Co-operation Agreement, to request further information from the requesting state. Were this court to find itself in the same position, the same would apply.)

29. So far as concerns what this court should do when considering the judge's substantive conclusion on this proportionality issue on appeal, the approach should be no different to the approach taken on the other comparable proportionality issues – i.e. it should be the approach explained by Lord Neuberger in *Re B (A child)(Care proceedings: threshold criteria)* [2013] 1 WLR 1911 at paragraphs 90 to 94. Applying the standard explained there to the appeal in this case the challenge to the District Judge's conclusion on the section 21A(1)(b) proportionality issue fails.

(2) The article 8 ground of appeal

30. The District Judge's conclusion on whether extradition would comprise a disproportionate interference with article 8 rights is at paragraph 35 of the judgment.

> "I find that it will not be a disproportionate interference with the article 8 Rights … for extradition to be ordered. My reasons and findings are as follows:
>
> (i) It is very important for the UK to be seen to be upholding its international extradition obligations and the decisions of the JA should be afforded proper mutual confidence and respect. It is important that offenders are brought to justice.

> (ii) The offence [Mr Vascenkovs] is said to have committed is serious involving fraud against the state. In this jurisdiction I have found [he] would face a custodial sentence if convicted … notwithstanding the time he has spent in custody in the UK for this matter. In any event, this is a matter more properly considered in the requesting state as per *Celinski*.
>
> (iii) I accept that [Mr Vascenkovs] has a settled private life here in the UK. He has provided no evidence of any strong family friendship ties in the UK save for his partner. He has a partner of 6 months but they do not live together. Their relationship started after [Mr Vascenkovs] was released from custody for these matters. His partner has made clear her intention to remain the United Kingdom if [Mr Vascenkovs] were extradited. There is no indication in evidence that she cannot visit [Mr Vascenkovs] in Latvia to continue the relationship. Similarly [Mr Vascenkovs] has indicated that he intends to return to the UK, if extradited. He can resume his working life and relationship. There is no evidence before me as to the relationship [Mr Vascenkovs] has with is partner's son nor any evidence that if extradited, there will be any adverse impact on the child given the length of the relationship and the parties living arrangements. The partner is financially independent and does not rely on the income [Mr Vascenkovs].
>
> (iv) [Mr Vascenkovs] has stated that he provides financial assistance to his mother and sister. I note [Mr Vascenkovs'] sister has a husband who is working in Finland and providing financial support. I have no information as to what extent [Mr Vascenkovs'] mother is reliant on his financial support. I find there is no evidence before that if [Mr Vascenkovs] were extradited, the impact on his sister or his mother that meets the hurdle amounting to strong counter balancing factors for me to find that extradition would be a disproportionate inference with his Article 8 rights. I find those strong counterbalancing factors do not exist in this case. The hardship and impact which will result from extradition does not go beyond that which is often present when extradition is ordered."

31. There is no error of principle of this reasoning. On the facts, I would have reached the same conclusion. In this case, given Mr Vascenkovs' relatively short-lived and sparse private life and personal connections in the United Kingdom, an article 8 submission would only be likely to succeed following a conclusion that the seriousness of the alleged offending *per se*, did not warrant extradition. On the facts of this case the article 8 ground of appeal is entirely dependent on the section 21A(1)(b) ground.

Since that latter ground has failed, the article 8 ground can fare no better. This ground of appeal also fails.

C. The application to amend

32. Mr Vascenkovs applies to amend the grounds of appeal. The contention is that his surrender to face trial in Latvia would, by reason of prison conditions there give rise to a real risk of article 3 ill-treatment. Prison conditions in Latvia were considered by the Divisional Court in *Danfelds v Latvia (No. 2)* [2020] EWHC 3199 (Admin). The Divisional Court considered a 2017 report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"), exchanges between the Council of Europe and the Latvian authorities that had followed that report, and answers to specific enquiries the court had made of the Latvian authorities. The court rejected an article 3 submission made by reference to prison conditions in the Griva section of Daugavgriva Prison. A further submission concerned the prevalence of inter-prisoner violence in Latvian prisons. The court rejected this submission saying the following:

> "64. Leaving aside this isolated assault, there is considerable evidence, including from the CPT and the Ombudsman, of a more wide-ranging problem of inter-prisoner assaults. There is evidence of an established hierarchy amongst prisoners in Latvia, which increases the risk of such violence. There is also evidence of unfilled vacancies for prison staff in Latvia, including at Riga Central Prison. Again, we accept that this potentially increases the risk of inter-prisoner violence. Nevertheless, the evidence (including in particular the response to the Court's questions) also shows that the Latvian authorities are seeking to address the problem. All information about inter-prisoner violence is registered, regardless of whether a complaint is made. This material is forwarded to an investigator who decides whether to pursue criminal proceedings. In allocating prisoners to accommodation consideration is given to the need to reduce the risk of inter-prisoner violence. The Ombudsman is able to identify and pursue any shortcomings in the response of the prison authorities.
>
> 65. The evidence falls far short of that which would be required to rebut the presumption that Latvia complies with its obligations under Article 3 ECHR – see the conclusion on more extreme facts in *Bartulis v Pabevezys Regional Court, Lithuania* [2019] EWCH 3504 (Admin) at [121]-[122]."

33. Mr Vascenkovs relies on the CPT's latest report dated 11 July 2023 which followed the Committee's visit to Latvia in May 2022. The Executive Summary of the report includes the following:

> "The CPT is also seriously concerned to note that no significant progress has been made in reducing the scale of inter-prisoner

> violence, which has been repeatedly criticised by the Committee during its previous visits. During the 2022 visit, the delegation once again received many credible allegations of inter-prisoner violence, including beatings, and psychological pressure. The information gathered during interviews with staff and inmates and an examination of registers of bodily injuries suggested that inter-prisoner violence remained a serious problem at Jelgava and Daugavgriva Prisons. As in the past, this state of affairs appeared to be the result of a combination of factors, mainly the existence of informal prisoner hierarchies, insufficient staff presence in prisoner accommodation areas and the lack of purposeful activities for most inmates, especially prisoners under the low-level regime and those on remand, who generally spend 23 hours a day in their cells."

The CPT's views on inter-prisoner violence are further set out at paragraphs 71 to 79. In these paragraphs it is noted that although the level of inter-prisoner violence had decreased at Riga Prison, it remained a "serious problem" at Jelgava Prison and Daugavgriva Prison. At paragraph 80 the report sets out the following conclusion and recommendation.

> "80. The CPT calls upon the Latvian authorities to take resolute action, without further delay, to address the systemic and persistent shortcomings throughout the penitentiary system outlined in this and previous reports of the Committee, in light of the remarks in paragraphs 71 to 79.
>
> The Committee also recommends that the Latvian authorities take proactive steps to combat inter-prisoner violence in light of the above remarks notably by investing far more resources in recruiting additional staff and developing staff professionalism and training as well as offering detained persons a purposeful regime and decent living conditions …"

34. The Latvian authority's response to the CPT report was published at the same time as the Committee's report. It included the following on the issue of inter-prisoner violence:

> "Prisons take all possible preventative measures for reducing inter-prisoner violence, but implementation of these measures also depends on the number of prison staff and the quality of the infrastructure. In addition, reducing inter-prisoner violence is undeniably important for the prison itself to guarantee order and safety at prison.
>
> Inter-prisoner violence can be partially reduced by resocialisation programs developing social, communication and interaction skills, discovering and correcting thinking errors.

> To this end, within the scope of the European Social Fund project "raising the efficiency of resocialisation system" … the resocialisation programme "Me and Others" is being developed, aimed at promoting the development and improvement of social competence of convicts and the psycho social skills comprising it, promoting self-understanding, awareness of own values, development of moral competence and learning new socially acceptable behaviour patterns, including solving conflict situations without using violence. "Violence Reduction Program" has been adopted with the purpose of reducing the frequency and intensity of aggressive behaviour, reducing or elimination anti-social beliefs and attitudes that support aggression and violence and promoting the application of appropriate inter personal skills that can reduce the risk of future violence.
>
> Work is also underway on the adoption and implementation of three specialised programmes …
>
> All the aforementioned resocialisation programmes are planned to be implemented in 2023.
>
> …
>
> The LPA undertakes to take steps to address the shortcomings outlined in the Report and previous reports, in line with the remarks in paragraphs 71 to 79.
>
> The LPA regularly informs the State Employment Agency (SEA) and includes lists of vacant positions in the data base for publication … and has also used the announcement of vacancies in the job advertisement portal …
>
> Lists of vacant positions are (constantly) posted on the website of the LPA. The LPA took part in the campaign of the MoJ "To Err is Human. So is to help" and as part of the SEA event "Career Week 2023" in online discussions with the aim of attracting employees of the LPA as well as increasing the understanding of the public and those employed in the authorities about the operational objectives the authorities, their daily work and specifics and benefits thereof."

35. The submission for Mr Vascenkovs is that matters have moved on since the judgment in *Danfelds*, and that the continuing concern about inter-prisoner violence raises an arguable case that the possibility he may serve a prison sentence in Latvia gives rise to a real risk of article 3 ill-treatment.

36. I do not accept this submission. There is a presumption that Council of Europe states such as Latvia, are willing and able to fulfil their obligation not to subject any person to article 3 ill-treatment or expose any person to a risk of the same. The presumption

of compliance is strong and will prevail save where exceptional circumstances are demonstrated. In this case the CPT noted at paragraph 79 of the 2023 Report that prison management "assured" the delegation that they were trying to tackle inter-prisoner violence. The CPT also noted that levels of such violence had reduced at Riga Central Prison. The Latvian authorities' response to CPT report identifies specific steps being taken to re-socialise prisoners to reduce resort to violence and to increase the number of prison officers. This shows there is a continuing willingness on their part to address the present position. The same is shown by the fact that there is a system in place for reporting prisoner violence and obtaining redress. It is obviously concerning that progress since the 2016 visit of the Committee has been slow. But the situation has not deteriorated since the 2016 visit, and the Latvian authorities remain committed to addressing the situation and appear to have made some progress at Riga Central Prison. Taking matters in the round, it is not right to infer that there are substantial grounds to believe that if Mr Vascenkovs is surrendered he would be at risk of article 3 ill-treatment. The application to amend is therefore refused.

D. Disposal

37. For the reasons above: (1) the application to amend the grounds of appeal is refused; and (2) the appeal is dismissed.