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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(DIVISIONAL COURT)

IN THE MATTER OF THE EXTRADITION ACT 2003

ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST

BETWEEN:

GENERAL PROSECUTOR'S OFFICE OF LATVIA

Respondent/Interested Party

and

MARIS ANCEVSKIS

Appellant/Applicant

and

IN THE MATTER OF AN APPLICATION BY MARIS ANCEVSKIS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

[Latvia v Ancevskis No.2]

Mr Tony McGleenan KC and Mr Stephen Ritchie (instructed by the Crown Solicitor's Office) for the Respondent/Interested Party
Mr John Larkin KC and Mr Joseph O'Keeffe (instructed by Tiernans Solicitors) for the Appellant/Applicant
Ms Marie-Claire McDermott (instructed by the Crown Solicitor's Office) for the Respondent to the Judicial Review

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Before: McCloskey LJ, Horner LJ and Fowler J

McCLOSKEY LJ (*delivering the judgment of the court*)

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Introduction

[1] In these extradition appeal proceedings the General Prosecutor's Office of Latvia acts on behalf of the requesting state, while the requested person is Marius Ancevskis ("the Appellant").

Ancevskis No 1

[2] This is the second appeal to this court in this case. In *General Prosecutor's Office of Latvia v Ancevskis* [2021] NIQB 116 ("Ancevskis No 1") the appealing party was the requesting state. The history, a regrettably protracted one, is rehearsed at para [4] in the following terms:

> "[4] It is convenient at this juncture to rehearse certain key dates and events:
>
> (a) 24 September 2003: date of first offence.
>
> (b) 4 December 2003: sentenced to two years imprisonment, suspended for two years in respect of (a).
>
> (c) 8 November 2005: date of the second offence in the sequence, namely driving a vehicle while under the influence of alcohol.
>
> (d) 30 November 2005: the requested person is alleged to have admitted the second offence. By a judicial restraint measure he was required to obtain the

consent of the court if proposing to alter his place of residence.

(e) December 2005 to April 2006: two court listings and two adjournments.

(f) 15 May 2006: the requested person left Latvia without the permission of the court and travelled to Northern Ireland.

(f) 17 May 2006: the requested person failed to attend court in Latvia.

(g) 12 December 2006: First EAW issued, for the purpose of prosecuting the requested person for the second offence (*supra*).

(h) 31 January 2013: Requested Person is arrested in respect of the first EAW and is remanded in custody.

(i) 10 May 2013: Requested Person's is released on bail having served 3 months and 10 days in custody.

(j) 21 June 2013: order of the County Court discharging the requested person in respect of the first EAW on the ground that the requirement of dual criminality was not satisfied.

(k) 25 October 2016: requested person is convicted in his absence in Latvia for the second offence.

(l) 25 September 2018: issuing of the subject EAW.

(m) 18 November 2020: execution of the subject EAW by arrest of the requested person in Crossmaglen.

(n) 2 June 2021: grant of bail.

(o) 16 September 2021: decision of the County Court Judge under appeal.

(p) 23 September 2021: order of this court granting the requesting state permission to appeal."

[3] In short, in Ancevskis No. 1 this court (differently constituted) allowed the requesting state's appeal against the decision and order of Belfast County Court dated 16 September 2021 whereby the appellant had been discharged. At para [63] this court formulated the following order:

> "In accordance with section 29(1) and (5) …. the appeal of the requesting state is allowed, the first instance order discharging the requested person is quashed, the case is remitted to the first instance judge and the judge is directed to proceed in accordance with this judgment, as he would have been required to do if he had discharged the article 8(2) ECHR proportionality balancing exercise differently."

The appellant has remained on bail ever since.

Subsequently

[4] The appellant reacted by applying to this court for permission to appeal to the Supreme Court of the United Kingdom and the certification of two questions of law said to be of general public importance. By its order dated 15 March 2022 this court acceded to the appellant's application in part by certifying a question formulated by it as one of general public importance but declining to grant leave to appeal. By its order dated 8 August 2022 the Supreme Court refused leave to appeal on the ground that a point of law of general public importance had not been raised.

[5] Events thereafter unfolded rapidly. A hearing at Belfast County Court was convened on 19 August 2022. The judge gave an ex-tempore ruling, which has been considered by this court. In this ruling the judge observed:

> "[The appellant's counsel] …… asked that the court, in terms, adjourn to receive fresh evidence as to the article 8 point …"

Two further applications, of no direct relevance in this appeal context, were made, namely (a) to adjourn the proceedings to enable the appellant to apply to the Department of Justice to serve his sentence in Northern Ireland and (b) to adjourn the proceedings in order to make an application to the European Court of Human Rights (the "ECtHR"). The judge, in refusing all three applications, stated *inter alia*:

> "… the final order made by this court …. can be appealed and if there are new matters then there are powers that the High Court has, which this court does not, to allow, first of all, new evidence to be adduced and, secondly, for

> adjournment of proceedings in order that applications can be made elsewhere …
>
> I have concluded, therefore, that the requested person's arguments in terms of the article 8 points no longer find favour with the court and therefore I direct under section 21 that he should be extradited."

[6] An application to this court for leave to appeal ensued. By his decision and order dated 7 October 2022 the single judge refused the application. In doing so he observed at paras [9] and [11]:

> "The application [at first instance] was not to admit evidence, but was actually an application by the applicant to adjourn … to receive fresh evidence …
>
> The relevant evidence which he wished the court to admit in evidence is not even in existence now, but 'under contemplation.' That evidence when it exists is said to deal with the applicant's wife's medical condition, a psychological report on the family unit and an updated affidavit from the applicant. There is no evidence presented to this court to suggest that even now this evidence actually exists despite the period since December 2021 for the applicant to have it prepared …
>
> I would accept that there is an arguable case that [the judge] would have been entitled to admit fresh evidence had it existed, however he was not being asked to do this …
>
> This was an entirely speculative venture on the applicant's part … [the judge's] decision not to adjourn was a sound one and fell well within his discretion."

This Appeal

[7] The appellant renews his application for leave to appeal before this court. The contours of his challenge to the order at first instance have evolved significantly. In particular, the appellant no longer seeks to make the case that the first instance court erred in law in its original decision Ancevskis No 1 in dismissing the appellant's resistance to extradition on the grounds of the passage of time and article 3 ECHR – while, of course, acceding to his article 8 ECHR case. Rather, by his reconfigured case the appellant challenges the first instance court's most recent order, namely the extradition order, on the ground that it infringed his procedural rights under article 8 ECHR.

[8] The appellant's case is encapsulated in the following passage in counsel's skeleton argument: In conducting the hearing after remittal from the Divisional Court the County Court Judge must still accord due respect to the rights safeguarded by article 8 ECHR and must, at that stage, perform a proportionality assessment (or balancing exercise) of the competing interests of extradition and interference with the appellant's family life. The appellant, therefore, enjoyed a procedural right under article 8 ECHR [requiring the court to conduct] the balancing exercise at the time of its decision, which could include taking account of any fresh evidence admitted into evidence before it … The County Court Judge was required by the procedural obligation inherent in article 8 ECHR to permit the appellant the opportunity to present fresh evidence that could have an impact on the balancing exercise which the court must conduct under article 8 ECHR. Pausing, it is appropriate to observe that this is not the case which was advanced to either the first instance judge or the single judge of the High Court.

[9] The appellant's argument also draws attention to section 9 of the Extradition Act 2003 ("the 2003 Act"). This provides:

> "(1) In England and Wales, at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the summary trial of an information against the person in respect of whom the Part 1 warrant was issued.
>
> (2) In Scotland, at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as if the proceedings were summary proceedings in respect of an offence alleged to have been committed by the person in respect of whom the Part 1 warrant was issued.
>
> (3) In Northern Ireland, at the extradition hearing the appropriate judge has the same powers (as nearly as may be) as a magistrates' court would have if the proceedings were the hearing and determination of a complaint against the person in respect of whom the Part 1 warrant was issued.
>
> (4) If the judge adjourns the extradition hearing he must remand the person in custody or on bail.
>
> (5) If the person is remanded in custody, the appropriate judge may] later grant bail."

This provision makes clear the first instance court's power to adjourn the proceedings.

[10] The other material provisions of the 2003 Act are addressed infra.

Some English decisions

[11] It is perhaps surprising that the jurisprudence pertaining to section 29(5) appeals very limited. We have taken cognisance of two English decisions brought to our attention by Mr McGleenan KC and Mr Ritchie on behalf of the requesting state. Both are cases in which the requesting state appealed successfully against first instance discharge order, with remittal ensuing. In the first, *Warne v Magistrates Court Figueres (Spain)* [2015] EWHC 3807 (admin) the district judge's decision to discharge the requested person on the ground of oppression due to the passage of time was reversed on appeal. Upon remittal the district judge took two courses. First, further evidence bearing on the oppression issue was admitted and considered. The Divisional Court held that this was impermissible by virtue of the wording of s 29(5)(c), which it considered "unequivocal": see para [11]. The second course taken by the judge, namely to permit the requested person to advance an article 8 ECHR case for the first time, was not criticised on appeal. Rather the Divisional Court examined this issue on its merits, concluding that the judge's rejection of this case was unassailable. The judgment contains no elaboration of why the judge had not erred in this respect.

[12] In the second case, *Dempsey v Government of the United States of America* [2020] EWHC 603 (admin), the litigation procedural framework was as in *Warne,* the only points of distinction being that (a) the sole ground of the initial discharge order was that the offence grounding the requesting state's extradition request was not an extradition offence under the 2003 Act and (b) upon remittal the district judge refused to consider the requested person's case, not previously advanced, that his extradition would infringe his rights under article 3 ECHR. On further appeal the Divisional Court affirmed this decision. There are two important qualifications, however. First, one essential element of its reasoning was that the requested person had failed to advance this case at the original extradition hearing. Second, there was a procedural mechanism whereby the Divisional Court could – and did - consider this newly invoked bar, namely by applying rule 50.27 of the Criminal Procedure Rules, which enabled the Divisional Court to reconsider its first decision on appeal, subject to the threshold requirement enshrined in the rule, being exceptional circumstances. Full consideration of the article 3 case followed, at paras [34]–[50].

[13] In thus deciding the Divisional Court drew attention to its reasoning in *Chawla v Government of India* [2020] 1 WLR 1609 at para [26]:

> "The 2003 Act then proceeds by setting out, in various sections, questions that the district judge must decide including whether the relevant documents have been

provided (section 78) and whether there are any specified bars to extradition such as the passage of time (section 79). The sections are framed so that the district judge must order the discharge of the requested person if he answers a question in a particular way or must go on to deal with the person under another section and reach a decision on the question identified in that section. The final stage in that sequence is consideration of whether extradition would be compatible with the person's Convention rights, that is the rights conferred by the ECHR and incorporated into domestic law by the Human Rights Act 1998. If extradition would not be compatible with a person's Convention rights, he or she must be discharged. If extradition would be compatible, the district judge must send the case to the Secretary of State for his decision on whether the person is to be extradited. Section 87 of the 2003 Act is in the following terms:

> **'Human Rights**
>
> "(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998.
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.
>
> (3) If the judge decides that question in the affirmative, he must send the case to the Secretary of State for his decision whether the person is to be extradited.'"

[14] By the doctrine of precedent none of these decisions is binding on the NI High Court: see *Re Stepanoviciene* [2019] NIQB 90 at paras [22]–[25] and *Re McKernan* [1985] NI 385 at 389. They do not belong to the same legal territory in any event, fundamentally because the prism of s 6 of the Human Rights Act was not considered by the Divisional Court in either case. Furthermore, it would appear that *Warne* was not considered in *Dempsey*.

[15] Focussing on *Dempsey*, three particular observations are appropriate. First, neither the requested person's failure to advance his article 3 ECHR case at the first extradition hearing nor the Divisional Court's powerful exhortations about

expedition and finality in extradition proceedings operated to preclude the belated article 3 case from being fully considered. Second, the procedural mechanism which the Divisional Court invoked in Dempsey is not available to the NI High Court in extradition appeals: compare Order 61A of the Rules of the Court of Judicature. Third, we consider that, in principle, there is no distinction of substance between the context of Mr Dempsey's new article 3 case and that of this appellant's updated, refurbished article 8 case which, subject to considering the evidence on which this is based (when this materialises), by definition and in reality is likely to differ in certain respects from his original article 8 case.

The Section 29 issue

[16] The first question arising in this appeal is whether the powers available to a judge upon remittal from this court pursuant to an order made under section 29(5) include a power to adjourn the remitted proceedings. The answer is unhesitating "yes", by virtue of the terms of s 9 of the 2003 Act (*supra).*

The Procedural Dimension of article 8 ECHR

[17] The second, and main, question to be determined is whether in the instant case the judge erred in law in refusing to adjourn the proceedings for the purpose canvassed namely to enable the appellant to gather further and fresh evidence in support of his article 8 ECHR resistance to extradition. We consider that this question invites an affirmative answer by virtue of the following analysis.

[18] The Convention right invoked by the appellant upon remittal, article 8 ECHR, protects a person's right to respect for private and family life and, in domestic law, does so via the machinery of the Human Rights Act 1998. Section 7(1) of the Human Rights Act entitles a person to either bring a human rights claim against the appropriate public authority or rely on any of the protected Convention rights "in any legal proceedings." This latter entitlement is re-stated in the extradition lex specialis, by section 21(1) of the 2003 Act. By section 6(1) and (3) of the Human Rights Act at every stage of extradition proceedings the first instance court must avoid acting in a manner incompatible with any protected Convention right in play.

[19] In the present instance the Convention right invoked by the appellant upon remittal was article 8 ECHR. The statutory duty thereby imposed upon the first instance court was to avoid acting incompatibly with this right. The appellant sought an adjournment of the proceedings for the purpose of assembling what may be described in shorthand as updated article 8 evidence. The judge refused his application. In thus acting the judge did not act incompatibly with the appellant's substantive rights (and those of his family members) under article 8(1) ECHR. However, the analysis must progress to, and complete, one further, and important, stage.

[20] By virtue of the Convention jurisprudence article 8 ECHR encompasses a procedural dimension separate from, though complementary to, its substantive content. This arises in an implied way through the channel of procedural obligations. The nature of this right was summarised in *R (AM A Child)* [2017] UKUT 262 (IAC) at paras [58]–[60]. It reposes in a series of decisions of the ECtHR, some of which are noted in para [58] of *AM*. This discrete procedural right is formulated by the Strasbourg Court in, for example, *Tanda-Muzinj v France* [Application No 2260/10] at para [68]:

> "The court further reiterates, by way of comparison, that in the event of deportation, aliens benefit from the specific guarantees provided for in article 1 of Protocol No. 7. Whilst such guarantees with regard to the family life of aliens are not regulated by the Convention under article 8, which contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by article 8 (see, in general, McMichael v the United Kingdom, 24 February 1995, § 87, Series A no. 307-B, and, in particular, Cılız v the Netherlands, no. 29192/95, § 66, ECHR 2000-VIII, and Saleck Bardiv Spain, no. 66167/09, § 30, 24 May 2011). In this area, the quality of the decision-making process depends on the speed with which the State takes action (see Ciliz, cited above, § 71; Mubilanzila Mayeka and Kaniki Mitunga v Belgium, no. 13178/03, § 82, ECHR 2006-XI; Saleck Bardi, cited above, § 65; and Nunez v Norway, no. 55597/09, § 84, 28 June 2011)."

The context in which this decision (in common with others) was made was that of deportation. In *Lazoriva v Ukraine* [2018] ECHR 6878/14 the court stated at para [63]:

> "Whilst article 8 contains no explicit procedural requirements, the applicant must be involved in the decision making process, seen as a whole, to a degree sufficient to provide him or her with the requisite protection of his interests, as safeguarded by that article …."

[21] In *AM* the Upper Tribunal offered the following test, at para [60]:

> "The test to be distilled from the Strasbourg jurisprudence is whether those affected by the decision under scrutiny have been involved in the decision making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests. This

> procedural aspect of article 8 is designed to ensure the effective protection of a person's substantive article 8 rights. As the decision of the Court of Appeal in Gudanaviciene makes clear there is a close association with the protections afforded by article 6 ECHR when issues concerning the procedural embrace of article 8 arise: see the judgment of Lord Dyson MR at [70]–[71]. "

As this passage indicates, the association between a person's procedural rights under article 8 and the familiar fair hearing rights protected by article 6 ECHR can provide a useful tool in determining whether rights of the former kind have been violated. This is clear from decisions such as *R (Gudanaviciene) v Lord Chancellor* [2015] 1 WLR 2247 at paras [70]–[71].

[22] On behalf of the requesting state it is acknowledged that in a context where an extradition order has been successfully challenged by a requesting state on appeal, with consequential remittal to the first instance court, that court is empowered to admit fresh evidence, albeit in an "extreme" case only. In this respect attention is drawn to what are said to be the vague terms in which the new evidence contemplated on behalf of the appellant is couched.

The out-workings of the above

[23] In refusing the appellant's application for an adjournment of the proceedings the first instance judge deprived him of an opportunity to assemble evidence in support of his continued resistance to extradition on the basis of his rights and those of his family members under article 8 ECHR. This we consider to be a paradigm example of a breach of the procedural dimension of this Convention right. While an appellate court will always accord an appropriate margin of appreciation to decisions of a first instance court of a case management nature, this is not the correct characterisation of the decision under challenge in this appeal. Rather the impugned decision must be viewed through the prism of the duty imposed upon the first instance judge as a public authority under section 6(1) of the Human Rights Act.

[24] Sections 26 and 27 of the Extradition Act 2003 Act provide:

> "**Section 26**
>
> **Appeal against extradition order**
>
> (1) If the appropriate judge orders a person's extradition under this Part, the person may appeal to the High Court against the order.
>
> (2) But subsection (1) does not apply if the order is made under section 46 or 48.

(3) An appeal under this section—

(a) may be brought on a question of law or fact, but

(b) lies only with the leave of the High Court.

(4) Notice of application for leave to appeal under this section must be given in accordance with rules of court before the end of the permitted period, which is 7 days starting with the day on which the order is made.

(5) But where a person gives notice of application for leave to appeal after the end of the permitted period, the High Court must not for that reason refuse to entertain the application if the person did everything reasonably possible to ensure that the notice was given as soon as it could be given.]

Section 27

Court's powers on appeal under section 26

(1) On an appeal under section 26 the High Court may—

(a) allow the appeal;

(b) dismiss the appeal.

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

(3) The conditions are that—

(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;

(b) if he had decided the question in the way he ought to have done, he would have been required to order the person's discharge.

(4) The conditions are that—

(a) an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing;

(b) the issue or evidence would have resulted in the appropriate judge deciding a question before him at the extradition hearing differently;

(c) if he had decided the question in that way, he would have been required to order the person's discharge.

(5) If the court allows the appeal it must—

(a) order the person's discharge

(b) quash the order for his extradition."

[25] The terminology of s 29 (appeals by the requesting state) is comparable. Paying due attention to the language of s 29(5), in the present case all of the following statutory expressions - with faithful adherence to the sequential statutory phraseology – denote the article 8 ECHR case advanced by the requested person at his original extradition hearing:

> "… the relevant question … the question … the relevant question … the relevant question ..."

None of these expressions, at this stage of the remitted proceedings, encompasses the updated article 8 case which the appellant aspires to advance to the first instance court consequential upon this court's remittal order one year ago. Rather, bearing in mind that this is a requested person's appeal under section 27, at the remitted hearing giving rise to this appeal the "question" in play under section 27(3) is whether the first instance court should have permitted the appellant an adjournment to construct, evidentially, an updated and refreshed article 8 case. This court has determined that this question should have been "decided … differently." Thus, with reference to section 27(2), the first of the statutory conditions for allowing this appeal is satisfied.

[26] The second of the statutory conditions to be satisfied is that the determination of this "question" in accordance with the decision of this court "would have" required an order discharging the appellant. To construe "would have" literally would give rise to a dismissal of this appeal. This would entail acting incompatibly with the appellant's procedural rights under article 8 ECHR, as assessed above. Thus, we agree with Mr Larkin KC that a Convention compliant interpretation in

accordance with section 3 of the Human Rights Act is required. This is achievable by the device of reading down "would" to "could" in the context of this appeal.

[27] This, however, raises the following question: How is section 27(5) to be applied? This provides:

> "If the court allows the appeal, it must—
>
> (a) order the person's discharge;
>
> (b) quash the order for his extradition."

[28] The significance of the following issue became apparent to the court when preparing its judgment. It appeared to the court prima facie incongruous that if it were to find merit in the appellant's contention that the impugned order at first instance had infringed the procedural dimension of his rights under article 8(1) ECHR the consequence would be allowing his appeal and ordering his discharge. This would be a surprising outcome as it would have entailed no consideration of the merits of the appellant's resistance to extradition. Rather such an order would be based upon success on a procedural issue only, entailing no consideration or determination of merits issues.

[29] In the foregoing circumstances the court invited the parties' further submissions and reconvened the hearing.

Judicial Review?

[30] The response on behalf of the appellant was to bring an application for leave to apply for judicial review. This gave rise to the question of whether it is possible for a requested person to challenge an extradition order by this mechanism. The effect of the course taken by the appellant was to generate, in parallel, a statutory appeal against the extradition order and a challenge thereto by judicial review.

[31] By the judicial review challenge the appellant pursues the following remedies:

(a) An order quashing the impugned decision.

(b) An order of mandamus directing Belfast County Court to hear and determine an application to admit fresh evidence.

(c) A declaration that the decision of Belfast County Court that it had no power to adjourn the proceedings under the 2003 Act was unlawful.

It appears to this court that, in substance, the appellant is pursuing an order quashing the impugned decision on the ground that it violated his procedural rights under article 8(1) ECHR. In his supporting affidavit the appellant avers that it was,

and remains, his wish to resist extradition with the assistance of additional evidence comprising a medical report in respect of his wife's "severely broken leg" and psychological reports pertaining to their two children.

[32] In the judicial review proceedings newly instructed counsel, Ms McDermott, represents the first instance judge. Her resourceful research has provided the following answer to one of the main questions raised by the court, namely whether illustrations of a challenge to extradition orders by judicial review rather than statutory appeal can be found among the decided cases. In this jurisdiction there are two such cases. In the first, *Re Ballan's Application* [2008] NIQB 40, the requested person challenged the order of Belfast County Court extraditing him to Lithuania in circumstances where he had purportedly consented to this course. Before the Divisional Court he argued that his consent had not been given voluntarily. This court quashed the first instance order on the ground that the court had failed to investigate the question of whether a valid consent had been provided by the applicant: see paras [27]–[32]. This is an interesting decision since, in orthodox terms, the vitiating factor in the court's extradition decision was procedural in nature and it chimes, therefore, with our diagnosis in the present case of a procedural aberration in the extradition order of the lower court.

[33] In *Re Campbell's Application* [2009] NIQB 82, on an application for habeas corpus arising from a preliminary ruling on abuse of process, against which no statutory right of appeal lies, the High Court held that habeas corpus is a remedy of last resort and thus generally inappropriate where judicial review is available as an alternative remedy: see paras [29] and[32]–[48].

[34] Ms McDermott, of counsel, brought to our attention three relevant decisions emanating from the jurisdiction of England and Wales. In the first of these cases, *Olah v Regional Court in Plzen, Czech Republic* [2008] EWHC 2701 (admin), there is a strong parallel with the present case. There the requested person's appeal against the extradition order was based on the District Judge's refusal to adjourn the hearing for the purpose of procuring a psychiatric report with a view to mounting a defence under section 25 of the 2003 Act. The Divisional Court converted the appeal to a judicial review application and made an order quashing the first instance decision. In so doing it reasoned that the challenge which the requested person was making to the extradition order did not fall within any of the statutory grounds of appeal and that the 2003 Act, section 34 in particular, did not oust the court's supervisory jurisdiction.

[35] In another English case, *Lazarov v Bulgaria* [2018] EWHC 3050 (admin) similarly a conversion order was made stimulated by the court's assessment that the requested person's case did not fit the framework of section 27 of the 2003 Act: see paras [11]-[12] and [15]–[16] especially.

[36] Next, *Celezynski v Polish Judicial Authority* [2019] EWHC 3450 (admin), in common with *Vallan*, concerned a challenge to the validity of the consent to

extradition purportedly given by the requested person. As in the two preceding cases Dove J concluded that there was:

> "… no jurisdiction in this case for an appeal under the 2003 Act to consider the procedural question of whether the appellant validly gave his consent to his own extradition …"

The court concluded that the purported consent was not lawful, thereby vitiating the consequential extradition order. The order of the court was one granting permission to apply for judicial review and quashing the impugned extradition order. The effect of this would be to require some other judge of the first instance court to rehear the case: see para [25].

[37] Other examples of relevant decided cases can be found: see Nicholls, Montgomery & Knowles, The Law of Extradition and Mutual Assistance (3rd ed), paras 9.21–22.

[38] The further cases considered above confirm this court's initial view that a challenge to an extradition order by a judicial review application is, jurisdictionally, possible. This proposition is harmonious with some elementary principles. The jurisdiction of the High Court is supervisory in nature. It operates to correct the errors of lower courts. It is a common law construct which does not require a statutory foundation, albeit there has been some statutory overlay since the Judicature (NI) Act 1978 and the Senior Courts Act 1981. While this jurisdiction can in theory be ousted by statute, the 2003 Act does not have this effect. Furthermore, with specific reference to the present case, the general principle that alternative remedies should be pursued prior to recourse to judicial review has been observed. This appellant has invoked and pursued his statutory right of appeal and has had recourse to a parallel judicial review challenge only because of the incongruity thrown up by his appeal highlighted above.

[39] The governing principle can be succinctly stated. In cases where a requested person or a requesting state wishes to challenge the decision and order of a first instance extradition judge on a ground not accommodated by the grounds of appeal specified in the 2003 Act, a challenge by judicial review may be available. In the abstract, there could be cases of a borderline nature in which the issue is not clear cut. In such cases the putative appellant may have to pursue an appeal and a judicial review application simultaneously. In this situation the choreography, in particular the sequencing, of the two legal processes can be conducted by a single judicial panel of the Divisional Court.

[40] Having regard to this court's assessment that the impugned order of Belfast County Court involved a breach of the appellant's procedural rights under article 8(1) ECHR the threshold for the grant of leave to apply for judicial review is clearly overcome. Furthermore, there is no discernible bar in principle to entertaining this

challenge substantively and granting a remedy. The only issue of substance, properly raised, is that of timing, having regard to Order 53 rule 4 of the Rules of the Court of Judicature. In a sentence, this judicial review leave application is out of time and can proceed only if the court exercises its discretion to permit this course. This provision of the rules and the principles to be derived from the related jurisprudence were addressed extensively in *Re Allister and Others' Applications* [2022] NICA 15 at paras [567]–[600]. The further dimension of the present litigation equation is that since a Convention right is in play this court must acquit its duty under section 6 of the Human Rights Act 1998 to avoid acting incompatibly therewith. Given the immediately preceding consideration and having regard to the manner in which the judicial review challenge has materialised, this court is satisfied that its discretion to extend time should be exercised.

[41] We would add that there was no argument on the discrete issue of whether the conversion order made in the English cases is an option available to this court. Provisionally, the answer is "no", having regard to the absence of any such power in the Rules of the Court of Judicature, specifically Order 61A which is the procedural lex specialis. The Court of Judicature Rules Committee may wish to give consideration to this matter.

[42] Finally, it is opportune to emphasise that Convention rights protected in domestic law are not designed to facilitate any misuse of the court's process. In the specific context of extradition proceedings first instance courts will always be alert to the question of whether any particular course of action pursued by a requested person, such as an adjournment of the proceedings, is vitiated by an improper or illegitimate purpose. Judicial interrogation of such applications will be appropriate in every case. At first instance level, strong case management and an alertness to any possible misuse of the court's process – indeed the statutory extradition process itself – are the weapons to be deployed to expose any impropriety. In the present case, the appellant's legal representatives cannot be faulted for not having updated article 8 ECHR evidence already assembled for the listing in question, given that only some two weeks had elapsed from the decision of the Supreme Court to refuse leave to appeal in Ancevskis No 1.

[43] Given that, as explained above, this court is satisfied that the impugned decision of Belfast County Court infringes this appellant's procedural rights under article 8(1) ECHR, the conclusion that the application for leave to apply for judicial review qualifies for an order (a) granting leave and (b) quashing the impugned decision follows inexorably.

[44] In light of the foregoing the need to determine the "would v could" issue identified in paras [25]–[26] above does not arise. For future reference, the following commentary in paras 7.10–7.14 of the textbook noted in para [37] above is noteworthy:

"7.10 Section 3(1) provides that so far as it is possible to do so, primary legislation and subordinate legislation (whenever enacted) must be read and given effect in a way which is compatible with Convention rights. This interpretive obligation goes beyond the previous rules which permitted courts to take the Convention into account when resolving an ambiguity in a statutory provision.

7.11 Section 3(1) requires courts to strive for compatibility, if necessary, by reading down over-broad legislation or reading necessary safeguards into an Act. It may involve giving a meaning to a statutory provision which it would not ordinarily bear, if necessary, by jettisoning particular words in a section or by implying words into a section. If a higher court cannot properly construe a statute so as to be compatible, then the court may make a declaration of incompatibility under s.4.

7.12 In *R v A* (No 2) [2002] 1 AC 45, para 44 Lord Steyn explained the effect of s.3:

> 'In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so.'

7.13 In *Lukaszewski v The District Court in Torun, Poland* [2012] UKSC 20, para 38, the Supreme Court said that the interpretive obligation imposed by s.3 of the Human Rights Act 1998:

> "… may involve reading in words, provided that they are 'compatible with the underlying thrust of the legislation' and do not go against 'the grain of the legislation…'

7.14 The obligation in s.3(1) applies to all courts and tribunals. Lower courts are thus no longer bound by a previous construction which has been given to existing

> legislation by a higher court if, in the opinion of the inferior court, this construction would lead to a result which would be incompatible with the Convention rights."

Conclusion and Order

[45] Giving effect to all of the foregoing the following order is made:

(i) The statutory appeal against the impugned extradition order is dismissed.

(ii) Leave to apply for judicial review is granted.

(iii) Time is extended

(iv) The decision of Belfast County Court is quashed by an order of Certiorari.

(v) Costs (following receipt of submissions): the appellant is granted legal aid for the extradition appeal; there shall be no order as to costs *inter – partes* in the appeal; in the judicial review the respondent shall pay the applicant's costs, to be taxed in default of agreement; the Interested Party shall bear his costs.

(vi) There shall be liberty to apply.