Neutral Citation Number: [2021] EWHC 69 (Admin)

Case No: CO/3333/2019 & CO/3404/2019

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:

LORD JUSTICE HOLROYDE

MR JUSTICE SWIFT

- -

Between:

CESAR ENASOAIE

Appellant/Cross-Respondent

- and -

COURT OF BACAU, ROMANIA

Respondent/Cross-Appellant

- -
- -

Jonathan Hall QC & Benjamin Joyes (instructed by **Shaw Graham Kersh, solicitors**) for the **Appellant**
Helen Malcolm QC & David Ball (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing dates: 11th & 12th November 2020

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Approved Judgment

Covid-19 Protocol: This judgment has been handed down by the judge's clerk remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand down is deemed to be 11:00am on 20th January 2021.

Lord Justice Holroyde and Mr Justice Swift :

1. Cesar Enasoaie ("Mr Enasoaie") has been convicted before the court of Bacau in Romania of twelve offences of embezzlement. On 11 October 2017 he was sentenced to 5 years' imprisonment, all of which remains to be served. In the absence of any appeal, that sentence was made final on 18 November 2017. On 29 November 2017 the Romanian court, as the competent judicial authority (for convenience, "the JA"), issued a European Arrest Warrant, reference number 16038/180/2016 ("the EAW"). The EAW was certified in this country by the National Crime Agency on 18 June 2019, and Mr Enasoaie was arrested two days later. On 23 August 2019 District Judge Zani ("the DJ") ordered his extradition on nine of the offences but discharged him on the other three offences. Mr Enasoaie now appeals against the decision ordering his extradition. The JA cross-appeals against the decision discharging Mr Enasoaie on three offences.

2. We record at the outset our thanks for the very helpful written and oral submissions which we have received.

The EAW

3. Mr Enasoaie is now aged 46. The EAW relates to offences, committed on various dates between February 2003 and November 2012, of embezzlement (Article 215 of the Romanian Criminal Code[1]), forgery of documents under private signature (Article 290[2]) and stamp forgery (Article 283 para 1[3]).

4. Mr Enasoaie was convicted and sentenced on a total of 7 occasions. His final sentence of 5 years' imprisonment was reached by the application of the procedure contained in the Romanian Criminal Code for aggregation of sentences for multiple offences. Under that procedure, the aggregated or final sentence (also referred to as "the resulting sentence") was the single sentence to be served by Mr Enasoaie as punishment for all of his criminal conduct.

5. The EAW gives the following details of the twelve offences:

   Criminal sentence 325/02.06.2006 was a sentence of 2 years' imprisonment for "committing the embezzlement offense in continued form", consisting of –

   Offence (i): Mr Enasoaie "collected from Se. Pepa Prod SRL Piatra Neamt, on 18.02.2003 and 05.03.2003 the amounts of 5.146.595 RON, respectively 4.095.682

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1 Explained in the EAW as follows: "The appropriation use or trafficking by a clerk, in her/his interest or in the interest of another person, of money, values or other assets that s/he manages or operates, are punished by imprisonment from 1 to 15 years. If the embezzlement had extremely serious consequences, the sentence is imprisonment from 10 to 20 years and the prohibition of certain rights".

2 "Forging a document under private signature by one of the modalities presented in art.288, if the perpetrator uses the forged documents or he hands them to another person for use for producing a legal consequence, this action shall be punished by imprisonment from 3 months to 2 years or by a fine."

3 "The forgery of stamps, postmarks, post envelopes, post cards, travel or transport tickets, international reply coupons or the release into circulation of such forged values shall be punishable by imprisonment from 6 months to 5 years."

RON as well as the amount of 2.991.541 RON from SC Delta Corn SRL Piatra Neamt, without depositing them in the unit's account";

Offence (ii): "on 15.04.2003, 19.03.2003, 23.04.2003, 23.04.2003, 25.04.2003, 09.05.2003, 09.05.2003, 17.05.2003, 21.05.2003, 23.05.2003, 03.06.2003 and 13.06.2003, the indictee has collected from Bacau warehouse amounts of money coming from the collection of the invoices' amounts of different economic operators. The indictee has appropriated the respective amounts of money".

Criminal sentence 998/19.05.2008 was a sentence of 18 months' imprisonment for offences of embezzlement and forgery:

(iii) "Between 1.06.2005 – 1.05.2006 as sales agent of SC Tiberias 200 SRL Bacau, by modifying the data on the second copy of the receipts printed for the highlighting of the amounts collected from clients, either by specifying an amount of money inferior to the collected one, or by writing the name of another company in relation to the collection he has appropriated the amount of 2635.88 RON" [approximately £500].

Criminal sentence 8/11.01.2010 was a sentence of 18 months' imprisonment for "the embezzlement offence in continued form":

Offence (iv): "during November 2006–May 2008, being a Distribution Manager at SC Partner Groups SRL Onesti, by forging several invoices he has appropriated the amount of 13,271.88 RON [over £2,500] at the expense of the company that he represented, the prejudice not being recovered".

Criminal sentence 1940/19.11.2012 was a sentence of 2 years' imprisonment for offences of embezzlement and forgery:

Offence (v): "during August 2008 – May 2009, being the employee of SC Bardi Auto SRL Chiajna, Ilfov county, as a commercial representative, based on a single criminal resolution by the forgery of documents he has appropriated money and goods from the administration with a total value of 33,134.78 RON" [over £6,300].

Criminal sentence 1545/12.10.2015 was a sentence of 2 years 6 months' imprisonment for stamp forgery offences:

Offence (vi): "as a bus ticket inspector, during November 2010 – January 2011, he has filled in 7 counterfeited commutation tickets and he has sold the defendants Antoche Laurentian Iulian and Mengheres Alexandru Gabriel, counterfeited commutation tickets, to be released into circulation".

Criminal sentence 708/12.05.2016 was a sentence of 4 years 6 months' imprisonment for "committing the embezzlement offense … and the forged documents under private signature offense" consisting of –

Offence (vii): "during 06.2012- 11.2012, as a Sales Manager at SC Edcamada Construct S.R.L. Vaslui, based on the same criminal resolution, he has appropriated amounts of money from the completed sales and different goods from the inventory, causing the aggrieved person Edcamada Construct S.R.L. Vaslui a prejudice with the amount of 26.930,47 RON [£5,100];

Offence (viii): "he has appropriated from the inventory goods with the total value of 11.119,88 RON [£2,100] afferent to the fiscal invoices series VSEDC no. 59864/01.11.2012 of 4.291,65 RON, nr. 59475/17.07.2012 of 752 RON, nr. 3672/13.11.2012 of 3.101,14 RON, nr. 3154/31.08.2012 of 435,02 RON, nr. 3096/27.08.2012 of 435,02 RON, nr. 59711115.08.2012 of 940,01 RON, nr. 59578/30.07.2012 of 1.165,04 RON, which he did not deliver to the beneficiary legal persons and which he has used without depositing their countervalue at the company";

Offence (ix): "he has appropriated from the administration the amount of 8.522,33 RON [£1,600] afferent to the collection receipts no. 5100/03.11.2012 of 1.100 RON (client S. C. A1ova Corn S.R.L.), no. 5601/01.11.2012 of 3.000 RON (client Metal Invest Grup S.R.L.), no. 5602/02.11.2012 of 3.081,54 RON (client S.C. Metal Invest Grup S.R.L.), no. 5603/07.11.2012 of 764,79 RON (client Nechit Monastery) and no. 5604/16.11.2012 of 576 lei (client Terra Nice S.R.L.), which he has not deposited in the account of S.C. Edcamada Construct S.R.L. Vaslui";

Offence (x): "he has appropriated from the administration the amount of 7.288,26 RON [£1,400] by forging the green copy of four payment receipts, respectively no. 5084/06.07.2012 of 2.476,03 RON, no. 5078/13.06.2012 of 3.112,84 RON, no. 5085/29.08.2012 of 2.114,39 RON and no. 5087/25.07.2012 of2.635 RON, inserting on these copies smaller amounts and other clients than those on the blue copies delivered to the legal persons and which certified the reality, respectively no. 5084/30.08.2012 of 1.000 RON, no. 5078/20.08.2012 of 550 RON, nr. 5085/31.08.2012 of 1.000 RON and no. 5087/31.08.2012 of 500 RON".

Criminal sentence 1519/11.10.17 was a sentence of 5 years' imprisonment for "committing the embezzlement and forgery and use of forgery" consisting of

Offence (xi): "during June-August 2011, as a sales agent of SC Sprinter 2000 SA Brasov, he has continuously appropriated, on different periods but for the same criminal resolution and at the expense of the same passive subject, by different criminal methods presented in the factual situation, the total amount of 4.985,35 RON [£950]";

Offence (xii): "during June-August 2011, as a sales agent of SC Sprinter 2000 SA Brasov, he has forged, by counterfeiting, at different periods in time but for the same criminal resolution and at the expense of the same passive subject, the invoices allegedly issued to SC DUMI SRL (no. 7132437 of 22.06.2011), MEDICAL PRACTICE TUVEC CAMELIA (no.7132830 of 01.07.2011), SC ANAMATEX SRL (no.7133517 of 12.07.2011), SC COMTEL SRL (no.7134061 of 22.07.2011), SC MULTI SOFT SRL (no.7134067 of 25.07.201 1), SC GELMYDA SRL (no.7134078 of 28.07.2011 and no.7134080 of 28.07.201 1) and SC EUROLIL SRL (no.7134083 of 29.07.2011) respectively, the carbonless copies of the receipts no.7349300 of 21.06.2011, no.7351334 of 22.07.2011, no.7351336 of 26.07.2011 and no.7349895 of 01.07.2011, in the amount of 202,47 RON, supporting documents that he has delivered to this employer, and in this manner, he has facilitated the illegal appropriation of several amounts of money belonging to the aggrieved person".

The issues at the extradition hearing

6. Romania has been designated as a Category 1 territory for the purposes of the Extradition Act 2003 ("the Act") and Part 1 of the Act accordingly applies. Mr

Enasoaie raised issues as to whether the offences set out in the EAW were all extradition offences and whether his extradition would violate his rights under articles 3 and 8 of the ECHR.

7. Section 10 of the Act required the DJ to decide whether each offence specified in the EAW was an extradition offence and, if it was not, to order the discharge of Mr Enasoaie on that offence.

8. Section 65 of the Act, so far as material for present purposes, gives the following definition of an extradition offence:

> "(2) The conduct constitutes an extradition offence in relation to the category 1 territory if the conditions in subsection (3), (4) or (5) are satisfied.
>
> (3) The conditions in this subsection are that—
>
> (a) the conduct occurs in the category 1 territory;
>
> (b) the conduct would constitute an offence under the law of the relevant part of the United Kingdom if it occurred in that part of the United Kingdom;
>
> (c) a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct."

9. The JA's case is that the criterion in section 65(3)(b) is satisfied because in England and Wales, the conduct described in the EAW would constitute offences of theft (contrary to section 1 of Theft Act 1968) and fraud (contrary to section 2 of Fraud Act 2006). The statutory provisions creating those offences require, in each case, that a defendant be proved to have acted dishonestly. The decision of the Court of Appeal in *R v Barton and Booth* [2020] EWCA Crim 575[4] confirms that there is a two-stage test of dishonesty: (a) what was the defendant's actual state of knowledge or belief as to the facts; and (b) was his conduct dishonest by the standards of ordinary decent people?

10. Mr Enasoaie filed a witness statement, in which he said:

> "I accept that between 2003 and 2011 I committed a number of offences of embezzlement and forgery against companies I was then working for in Romania as a sales manager. I committed these offences as I was in financial difficulties at the time. To my knowledge all these offences were dealt with by the imposition of various suspended sentences in the Romanian courts between 2008 and 2013."

We note that in making that admission, Mr Enasoaie referred to all the offences in the EAW compendiously and drew no distinction between individual offences as to the manner in which, or the intent with which, he committed them.

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[4] See in particular [84], [91-92] and [105].

11. On 17 July 2019 the Crown Prosecution Service ("CPS") sent to the JA a formal request for further information. They asked, amongst other things, for confirmation as to whether each of the offences listed in the EAW involved dishonesty. Unfortunately, the reply of the JA ("FI 1") did not address that particular question. There was therefore no further information on that point before the DJ.

12. At the extradition hearing, the parties referred to *Assange v Sweden* [2011] EWHC 2849 (Admin) ("*Assange*"), *Kazimierczuk v Poland* [2011] EWHC 3228 (Admin) ("*Kazimierczuk*") and *Godlewski v Poland* [2016] EWHC 2404 (Admin) ("*Godlewski*"). On Mr Enasoaie's behalf it was submitted in relation to the embezzlement offences (i), (ii), (vii), (viii), (ix) and (xi) that the descriptions of conduct in the EAW did not compel the inference that he had acted dishonestly.

The DJ's decision

13. The DJ at [42 - 43] of his judgment ruled:

> "42. Having considered the helpful submissions made by the parties, and noting in particular the rulings in *Kazimierczuk* and *Godlewski*, I find as follows:
>
> In relation to the above challenged offences
>
> (i) (he collected money but failed to deposit into the company's account),
>
> (ii) (he collected money relating to different operators but then appropriated the money), and
>
> (xi) (he appropriated monies)
>
> I am not satisfied that the description of his conduct impels dishonesty per *Assange* and accordingly his challenge in respect of each of those offences succeeds and he is to be discharged in relation thereto.
>
> 43. In relation to the other challenged offences
>
> (vii) (he appropriated monies and in so doing **caused a loss** to the company)
>
> (viii) (he appropriated goods, by failing to deliver them, thereby **causing loss** to the company)
>
> (ix) he appropriated monies, failed to deposit into the company's account, thereby **causing loss** to the company. [emphases added by DJ]
>
> I am satisfied that his actions in respect of each of these charges impels dishonest conduct per *Assange* whereby the Dual

> Criminality test is passed and the challenge raised in respect thereof must fail."

14. The DJ went on to reject the challenges under articles 3 and 8. His ruling in that regard is not the subject of this appeal and we need say no more about it.

The grounds of appeal and cross-appeal

15. Mr Enasoaie appealed against the order for his extradition on offences (vii), (viii) and (ix), contending that the DJ was wrong to find that each of those embezzlement offences was an extradition offence as defined in the Act. The JA cross-appealed against the decision to discharge Mr Enasoaie on offences (i), (ii) and (xi), contending that the DJ was wrong to find that those embezzlement offences were not extradition offences.

Further information

16. Further information has been obtained by both parties since the hearing below. We will summarise it in chronological order. Neither party objected to our considering all of it, and we have done so in reaching our decision. As will be seen, the information has given rise to further grounds of appeal, on issues which the JA accepts Mr Enasoaie could not have raised before the DJ.

17. In response to a request for further information made on 16 January 2020 the JA replied ("FI 2"):

> "…according to the Romanian Criminal Code, the offenses for which Enasoaie Cezar was convicted do not belong to the category of those committed by dishonesty."

18. Mr Enasoaie's representatives obtained expert evidence from Dr Mihail Mareş, a Romanian attorney. In a report dated 25 March 2020, Dr Mareş said that under Romanian law, the resulting penalty imposed on a multiple offender has the force of *res judicata* and so in this case is fully enforceable as a penalty of 5 years' imprisonment. He stated that disaggregation of that resulting sentence is not possible. However, he also stated that disaggregation of Mr Enasoaie's resulting sentence on grounds of partial extradition and the speciality principle is "not likely". He went on to refer to Article 598 of the Criminal Code, which permits a "challenge to the enforcement" of a criminal judgment in certain circumstances but said that possible violation of the speciality rule is not one of the specified circumstances. He then noted that, although Romanian case law "is very poor on this matter", it appeared that the speciality rule had been invoked through the challenge to the enforcement of a criminal judgment in one case. He concluded:

> "… the possibility for Mr Enasoaie to successfully invoke the speciality rule as grounds to file a challenge to the enforcement of the judgment in order to reduce the penalty to be served thereby does not enjoy a high degree of certainty and thus may not be considered an effective remedy.
>
> Any disaggregation of sentences would imply that the judge should re-settle the merits of the case and violate the *res judicata*

> of the judgment. However, as noted above, these issues cannot be invoked by the challenge against the execution of a final criminal sentence, which is the general procedural remedy in the penalty execution phase."

19. On 22 April 2020 the CPS sought further information on three matters:

    i) What was the mens rea or mental element or intent for the offences of embezzlement of which Mr Enasoaie was convicted and sentenced under criminal sentences 325/02.06.2006, 998/19.05.2008 and 708/12.05.2016?

    ii) Whether the intent for each of the offences on the warrant was such that ordinary decent people would consider his conduct was dishonest, and if so why.

    iii) If the High Court agreed that Mr Enasoaie could not be extradited on three offences, how would Romania comply with the principle of speciality set out in Article 27/2 of the Council Framework Decision (2002/584/JHA) in relation to the execution of the merged sentence of 5 years' imprisonment?

20. In its reply ("FI 3"), the JA said that in all cases in which Mr Enasoaie was convicted by those criminal sentences,

> "… the manner of committing the offence of embezzlement was similar. Thus, as an employee of some trading companies, having as attributions the identification of customers, the conclusion in contract enforcement and the collection of money from customers, the defendant Cezar Enasoaie collected various sums of money from customers, but did not deposit them in the account of the company whose employee he was, but unjustly appropriated (in whole or in part) these sums, which he used for personal gain. The defendant acted in all cases with the form of guilty intent, knowing that the money received from customers was entirely due to the company where he was employed and yet he misappropriated this money. Obviously, for the reasons shown above, his behaviour can be considered dishonest by any ordinary decent person. [emphasis in the original]"

21. FI 3 went on to say, in relation to the third question:

> "[W]e hereby inform you that the Romanian criminal law does not provide for the possibility of the 'disaggregation' of sentences, in order to enforce only one/some of the sentences subject to the European Arrest Warrant, as such a measure would be unfavourable to the defendant, who could serve several sentences separately and which, cumulatively, amount to more than the resulting sentence imposed as a result of the merger."
>
> To this end, we hereby specify that the Romanian criminal law system regulates the legal cumulation of sentences – the hardest sentence plus an increase of 1/3 of the total of other sentences – and not the arithmetic cumulation of sentences

> Therefore, in case the extradition will be granted only for one/some of the sentences imposed on the defendant, the final warrant issued as a result of the merger will not be able to be enforced.

22. The JA also provided further information about some of the individual offences. This included, in relation to offences (i) and (ii), that during the investigation Mr Enasoaie had admitted appropriating 12,000 lei from his employer but stated that it was the amount of a guarantee which he had been required to pay when hired, and that "the company's accountant stated he was allowed to recover from the collections at a later date". That claim was contradicted by the company accountant, who denied having had any such discussion with him. The Romanian court concluded:

> "Regarding the subjective side, the defendant acted with direct intention, being aware of the socially dangerous consequences of his deed and pursued the special purpose provided by law, that of using the money obtained for personal gain. The defendant acted in the manner described above on several occasions during February-June 2003 and from the identical mode of operation the court deduces the existence of a single criminal intent, which leads to considering the fact that all material acts of embezzlement committed by the defendant are subject to a recurrent offence according to the provisions of art 41 para 2 of the Criminal Code."

23. Dr Mares was asked to clarify a number of matters in his report. He provided a supplementary report dated 5 August 2020. He referred to a decision of the Suceava District Court in 2013 in which the speciality rule was successfully invoked in a challenge to the enforcement of a criminal judgment. The offender in that case had been sentenced to a resulting penalty of 12 years' imprisonment. He was extradited from the Netherlands, but the Netherlands court discharged him on some matters. The Suceava District Court disaggregated the final sentence so that the offender would only serve the penalties for the offences in respect of which he had been extradited. The total sentence was thereby reduced from 12 years to 11 years.

24. Dr Mareş went on to refer to a decision of the High Court of Cassation and Justice ("HCCJ"), Romania's Supreme Court, in a case which also involved an offender subject to a resulting penalty who was extradited on some but not all of the relevant offences[5]. The HCCJ was asked for a preliminary ruling to clarify whether the penalty for the discharged offences would have to be served after the execution of the penalty for which extradition was granted. The HCCJ dismissed the referral as inadmissible on the grounds that the position was clear and there was no difficulty of interpretation.

25. Dr Mareş' opinion, in the light of that decision, was that the speciality rule is not applicable in the present case and that a challenge to the enforcement of the final sentence of 5 years by invoking the speciality rule "may not be considered an effective remedy".

[5] File no. 699/1/2020, Judgment no. 15, 28 May 2020

26. The CPS again sought further information, including asking what happened to a merged sentence if a requested person was returned to Romania in respect of some but not all of the offences within that sentence. The CPS referred to Article 117 of the Romanian Law No 302/2004 concerning international judicial cooperation in criminal matters ("Article 117"), which so far as material provides:

> "(2) Except in the cases referred to in paragraphs (1) and (4), a person surrendered to the Romanian authorities may not be prosecuted, sentenced or otherwise deprived of his/her liberty for a different act committed prior to his or her surrender other than that for which he/she was surrendered unless the executing member State gives its consent. …
>
> (4) The provisions set out under the previous paragraphs do not apply when one of the following circumstances occurs: …
>
> c) when the person having had an opportunity to leave the territory of the Member State to which he/she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it; …"

27. In its reply ("FI 4"), the JA said:

> "The opinion of the Judge delegated to the Criminal Sentence Enforcement Office, within the First Instance Court of Bacau, is the one already presented in our previous notification, i.e. if the extradition is granted just for one/some of the sentences handed to the defendant, the final warrant issued after this joining operation, will be impossible to enforce, due precisely to the application of the speciality principle.
>
> However, in this situation, the Delegated Judge shall submit before the trial Court, an appeal against the enforcement of the sentence, highlighting the existence of an obstacle to enforcing the resulting sentence making up the subject matter of the European Arrest Warrant issued in this case; in fact, the convict himself, Cezar Enasoaie, would also have the opportunity to file such an appeal against the enforcement of his sentence; thus, the Court would be able to decide, to what extent, the punishments ordered against the convict, could actually be enforced."

28. On 16 October 2020 the CPS asked specific questions as to whether violation of the speciality rule would be considered an obstacle to the enforcement of a judgment, and whether the remedy of a challenge to the enforcement would be available in this case. The questions related to Article 598 of the Criminal Procedure Code ("Article 598") which, so far as material, provides:

> "**Challenges against enforcement**
>
> (1) Challenges against enforcement of criminal sentences may be filed in the following situations: …

> (c) when ambiguities occur in respect of the sentence enforcement or when obstacles to enforcement occur; …
>
> (2) … challenges shall be filed … in the situation set under para (1) letter (c), with the court having returned the sentence that is being enforced. …"

29. The JA replied ("FI 5"):

> "1. The infringement of the speciality rule can be considered an obstacle to the enforcement of a decision.
>
> 2. The appeal against enforcement provided for by Article 598 of the Code of Criminal Procedure is available in this case. It is for the court with which the appeal against enforcement is lodged to decide whether the resulting sentence imposed cannot be enforced or whether it is possible to sever it in order to enforce only those sentences for which extradition has been granted."

30. Finally, in its reply ("FI6") to a request for further information made on 3 November 2020 the JA confirmed that FI 3 (see [20] above) also applied to the offences subject to criminal sentence 1519/11.10.2017.

The further grounds of appeal

31. We have noted at [15] above the initial grounds of appeal and cross-appeal, which relate to sections 10 and 65 of the Act. In the light of all the further information which has been gathered since the hearing before the DJ, Mr Enasoaie now puts forward further grounds relating to section 17 of the Act (speciality) and section 2 of the Act (required particulars of the sentence). It is however, acknowledged on behalf of Mr Enasoaie that neither of these further grounds can arise unless this court concludes that at least one of the offences referred to in the EAW was not an extradition offence.

Sections 10 and 65 of the Act: the submissions

32. In *Assange* at [57] the court summarised a submission made on behalf of Mr Assange, which it is apparent the court accepted:

> "It was accepted by Mr Assange that it was not necessary to identify in the description of the conduct the mental element or mens rea required under the law of England and Wales for the offence; it was sufficient if it could be inferred from the description of the conduct set out in the EAW. However, the facts set out in the EAW must not merely enable the inference to be drawn that the Defendant did the acts alleged with the necessary mens rea. They must be such as to impel the inference that he did so; it must be the only reasonable inference to be drawn from the facts alleged. Otherwise, a Defendant could be convicted on a basis which did not constitute an offence under

> the law of England and Wales, and thus did not satisfy the dual criminality requirement."

33. In *Kazimierczuk* a Polish judicial authority had issued a conviction EAW in which an offence, referred to as "peculation" under Article 284(2) of the Polish Penal Code, charged that the defendant had "misappropriated" a mobile phone which had been entrusted to him. It was submitted on behalf of the defendant that the conduct alleged did not necessarily mean that there was an ingredient of dishonesty. Ouseley J accepted that the wording of the relevant Polish statute was not clear but concluded at [15 -16]:

> "15. I am, however, entirely satisfied that "misappropriate" in the context of the Polish statute must include an averment that someone acted dishonestly. I am satisfied that that must be so because the word is used among other specific references in the context of both theft and in the context of peculation, the particular offence here. I do not accept the otherwise rather startling inference that the Polish offences involved no dishonesty at all and are each strict liability offences.
>
> 16. It is my judgment that it is the word "misappropriate" which contains the allegation of dishonesty. That is supported by the dictionary definitions. …"

34. That decision was followed in *Godlewski*, also a Polish case, in which the EAW alleged that the defendant had committed an offence contrary to Article 284(2) in which it was said he had "appropriated" property. Cranston J held that the District Judge had been entitled to find that the offence involved dishonesty and that dual criminality was established. He said, at [11]:

> "11. With *Kazimierczuk* as background the element of dishonesty is, in my judgment, clear in this warrant. That was what the District Judge, in his rather sparse judgment, concluded. Unlike *Gruszka*, *Kazimierczuk* involved the more serious offence of appropriating property entrusted to the appellant in article 284(2). Mr Hawkes pointed to the different translations of Article 284(2), in the present case as "appropriation" rather than as "misappropriation" in *Kazimierczuk*, the concept to which Ouseley J attached significance. To my mind, the crucial point in Ouseley J's reasoning is in the last sentence of paragraph 15: it is inconceivable that Article 284(2) is a strict liability offence if a sentence of up to 5 years can be imposed. Mens rea must be an element."

35. *Assange* was considered in detail in *Cleveland v USA* [2019] EWHC 619 ("*Cleveland*") at [58] ff. Holgate J, with whose judgment Leggatt LJ (as he then was) agreed, said at [63]:

> "63. … in some instances, extradition may be resisted because the English equivalent offence requires proof of a specific intent (e.g., dishonesty or knowledge of or belief in a state of affairs), whereas the foreign offence for which extradition is sought only

> requires proof of a simple intent and not also that specific intent. In this situation it is necessary for the court to apply the test in para. 57 of *Assange* to decide whether that gap in the ingredients of the foreign offence can be filled by drawing an inference from other matters set out in the warrant or extradition request. Here, dual criminality depends upon the court being satisfied that, if the matters constituting the alleged foreign offence were to be proved, the inevitable or only reasonable inference would be that the additional intent required by English law would also be established."

36. For Mr Enasoaie, Mr Hall QC submits that the DJ was correct to discharge Mr Enasoaie in respect of offences (i), (ii) and (xi), and wrong to order his extradition in respect of offences (vii), (viii) and (ix). He submits that FI 2 confirms that dishonesty is not an essential ingredient of the Romanian offence of embezzlement. It was therefore necessary for the JA to satisfy the DJ that the facts set out in the EAW not merely permitted, but compelled, the inference that Mr Enasoaie acted dishonestly: see *Assange* and *Cleveland*. The JA was unable to do so in relation to offences (i), (ii) and (xi): references in the EAW to Mr Enasoaie having "collected" or "appropriated" money did not clearly indicate that he dishonestly appropriated his employer's money with the intention permanently to deprive the employer of it. "Appropriation" does not mean the same as "misappropriation" (see *DPP v Gomez* [1993] AC 442 at p. 495 per Lord Browne-Wilkinson), and therein lies the distinction between this case and *Kazimierczuk*. *Godlewski* must also be distinguished, because although the conduct in that case was referred to as "appropriation", there was further information from the Polish authorities which clearly referred to "dishonest behaviour" by the requested person. For the same reasons, the DJ was wrong to find that offences (vii), (viii) and (ix) were extradition offences: the relevant conduct was again "appropriation", and – in marked contrast to offence (x) - offences (vii), (viii) and (ix) are not said to have involved forgery.

37. For the JA, Miss Malcolm QC accepts that the equivalent offence in England and Wales requires proof of dishonesty, but the Romanian offence does not, and that the test in *Assange* accordingly applies. She submits, however, that FI 3 and FI 6 clearly establish that Mr Enasoaie acted dishonestly. Offences (vii), (viii) and (ix) took place in the context of Mr Enasoaie also forging documents, and FI 3 establishes that he appropriated money which he knew belonged to his employer. The DJ was therefore correct to find that they were extradition offences. For the same reasons, he was wrong to find that offences (i), (ii) and (xi) were not extradition offences. In those cases also, Mr Enasoaie knew that he was taking his employer's money.

Section 17 of the Act: the submissions

38. The principle of speciality (also referred to as "specialty") requires that an extradited person may only be dealt with for offences for which he is extradited to the requesting state, and may not be dealt with for any other offence allegedly committed prior to his extradition, unless he is first given a reasonable opportunity to leave the requesting state.

39. Romania is a signatory to the European Convention on Extradition 1957. Subject to exceptions which do not apply in this case, article 14 of that Convention provides as follows:

> "Article 14 – Rule of speciality
>
> > A person who has been extradited shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence or detention order for any offence committed prior to his surrender other than that for which he was extradited, nor shall he be for any other reason restricted in his personal freedom …"

40. The principle of speciality is further provided for in Article 27 of the Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of 13 June 2002[6], ("Article 27") which so far as is material for present purposes states:

> "1. Each Member State may notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order for an offence committed prior to his or her surrender, other than that for which he or she was surrendered, unless in a particular case the executing judicial authority states otherwise in its decision on surrender.
>
> 2. Except in the cases referred to in paragraphs 1 and 3, a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered.
>
> 3. Paragraph 2 does not apply in the following cases:
>
> (a) when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it; …"

41. The provisions of Romanian law implementing these principles are contained in Article 117 of the Romanian Criminal Code, set out at [26] above. Dr Mares, in his first report, confirms[7] that that Article "essentially … regulates the principle of specialty under similar terms" as Article 27(2).

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[6] 2002/584/JHA

[7] Paragraph 2.1

42. The relevant domestic legislation is in sections 11 and 17 of the Act. By section 11(1)(f) and (3), a requested person must be discharged if his extradition is barred by reason of speciality. Section 17, so far as material for present purposes, provides:

> "**17 Speciality**
>
> (1) A person's extradition to a category 1 territory is barred by reason of speciality if (and only if) there are no speciality arrangements with the category 1 territory.
>
> (2) There are speciality arrangements with a category 1 territory if, under the law of that territory or arrangements made between it and the United Kingdom, a person who is extradited to the territory from the United Kingdom may be dealt with in the territory for an offence committed before his extradition only if—
>
> (a) the offence is one falling within subsection (3), or
>
> (b) the condition in subsection (4) is satisfied.
>
> (3) The offences are—
>
> (a) the offence in respect of which the person is extradited;
> …
>
> (4) The condition is that the person is given an opportunity to leave the category 1 territory and—
>
> (a) he does not do so before the end of the permitted period, or
>
> (b) if he does so before the end of the permitted period, he returns there."

43. In *Hiali v Spain* [2006] EWHC 1239 (Admin) it was contended on behalf of the appellant that the court could not be satisfied that the requisite speciality arrangements were in place in Spain. At [46] Scott Baker LJ, giving the judgment of the court, summarised the issue as being –

> "whether there are practical and effective arrangements in Spain to ensure that the appellant will only be tried for the offence for which he has been extradited or others disclosed by the same facts."

He added, at [49], that –

> "the basic question is whether the rule of specialty is catered for in Spanish law."

44. The appellant's submission was rejected as misconceived. Scott Baker LJ at [51] noted that the burden was on the appellant to establish that his extradition was barred on this ground. At [52] he said –

> "It seems to us a surprising submission that Spain is likely to act in breach of the international obligations to which it has signed up. There is no evidence before us that it has done so in the past and in these circumstances, we would need compelling evidence that it is likely to do so in the future. By Article 34 of the Framework Decision Member States were requested to take the necessary measures to comply with its provisions by 31 December 2003. It is not suggested that Spain has failed to meet this implementation provision. It seems to us therefore that it is to be inferred that the specialty arrangements referred to in s17(2) of the 2003 Act are in place."

45. In the related later case of *R (Hilali) v City of Westminster Magistrates' Court* [2008] EWHC 2892 (Admin), [2010] 1 WLR 241 it was held that a District Judge had been correct to hold that he did not have jurisdiction to investigate whether the claimant, following his return to Spain, was being detained or proceeded against in breach of the speciality rule. Dyson LJ (as he then was), giving the judgment of the court, said at [40]:

> "The 2003 Act requires the appropriate judge to satisfy himself that none of the bars to extradition exist and that the person's extradition would be compatible with his Convention rights. One of the bars is that there are no specialty arrangements with the requesting state. Once so satisfied, he or she must make the extradition order. Subject to an appeal under the 2003 Act, the extradition order cannot be challenged. It may transpire that, upon his surrender, a person's Convention rights are violated; or that he is dealt with in a manner which amounts to a breach of the specialty rule. If that occurs, it does not necessarily show that the extradition order should not have been made. But even if it does, for the reasons that we have given, the 2003 Act does not empower the appropriate judge to do anything about it. It is an assumption of the Framework Decision and Part 1 of the 2003 Act that any breaches of this kind will be capable of being remedied in the courts of the requesting state and, if necessary, in the European Court of Human Rights (breach of Convention rights) or in the Court of Justice of the European Communities."

46. In *Brodziak v Poland* [2013] EWHC 3394 (Admin) ("*Brodziak*") a judge had ordered the appellant's return to Poland on only two of the three offences set out in a conviction EAW, for which the appellant had been sentenced to a cumulated term of imprisonment. On appeal, he argued that his extradition was barred by reason of speciality: further information had been provided by the judicial authority to the effect that there was no prospect of the single sentence being disaggregated. It was submitted that there were therefore no effective speciality arrangements in place to cover the circumstances of the case. The relevant provisions of the Polish Criminal Procedure Code, contained in article 607e, stated:

> "1. A person surrendered in performance of a warrant cannot be [prosecuted] for offences other than those that formed the base for surrender or enforce the custodial sentence or other means involving deprivation of freedom imposed on that person for such offences.
>
> 2. The court that entered the absolute decision in the case can order enforcement of the penalty only for those offences, which formed the base for surrender of the wanted person …."

47. The court (Richards LJ and Silber J) said at [45-46, 49] that those provisions –

> "… are entirely consistent on their face with the protection of speciality in Poland. They are apt to ensure that, even where a single sentence has been imposed for multiple offences that include one or more non-extraditable offences, the sentence will be enforced only in so far as it relates to the offences for which the requested person has been extradited.
>
> 46. There is, moreover, a strong presumption that other Member States will act in accordance with their international obligations in respect of speciality.
>
> …
>
> 49. Accordingly, compelling evidence is in our view required to displace the strong presumption that the Polish authorities will act in accordance with their international obligations in respect of speciality, to which effect is given in article 607e of the Polish Criminal Procedure Code."

48. The court went on to say that the evidence that there could be no disaggregation of the single penalty had caused them "a degree of anxiety" but having considered the unsatisfactory nature of the information provided by the judicial authority they concluded that the evidence was not sufficiently compelling to displace the strong presumption that the Polish authorities would act in accordance with their international obligation in respect of speciality. The court gave two principal reasons for that conclusion. First, the law as stated in article 607e was consistent with the protection of speciality, and it was a matter for the Polish courts how that provision would be implemented in practice. Secondly, and very importantly –

> "57. … there is no evidence before us of even a single case in which an extradited person has been required in practice to serve a sentence relating in whole or in part to an offence for which he was not extradited. Yet there has been a large number of extraditions to Poland from the United Kingdom (and there have no doubt been many others from other Member States) for the purpose of serving a sentence following conviction; and it must be relatively common, as the present appeals suggest, for such cases to involve a single sentence imposed for multiple offences that include non-extradition offences. If this had given rise to a

> real problem in practice as regards breach of speciality, we would expect evidence of specific cases to be available. We do not think that an adverse inference as to the absence of effective speciality protection should be drawn on the basis of the limited material of a general nature that has been placed before us."

49. In *Edutanu v Romania* [2016] EWHC 124 (Admin), [2016] 1 WLR 2933 ("*Edutanu*"), a case concerning a number of defendants, an issue of speciality arose in relation to an EAW covering a "merged" offence. The CPS had sought confirmation that if extradition was ordered in respect of some but not all offences, the Romanian court would ensure that only the part of the sentence relating to the extraditable offences would be executed. The response received from the JA was unsatisfactory, but in relation to one defendant it indicated that the merged sentence was irrevocable and the defendant, if returned, would have to serve all of it without any possibility of dividing it into separate sentences. In relation to that defendant, Beatson LJ (with whom Cranston J agreed) distinguished *Brodziak* and concluded at [127] that the EAW did not meet the requirements of section 2 of the Act. At [129] he said:

> "Had the EAW been valid, then the strength of the presumption that Part 1 countries will abide by their obligations and the way that presumption was applied in Brodziak's case despite the unsatisfactory nature of the response received from the IJA in that case would have meant that the unsatisfactory response in this case would have had to have been discounted. The court may well have had to assume that, notwithstanding the terms of the response, since specialty is implemented into Romanian domestic legislation, there would be a remedy under Romanian law, even if the sentencing court or judge himself or herself had no power to fragment the serving of a sentence that had previously been issued as a total in a final sentence, as stated in the recent reply. But in any event, the recent response suggests that there is no remedy in Romania similar to the provisions of the Polish Criminal Procedure Code referred to in Brodziak's case (at [56]) for the protection of specialty and for a remedy should specialty rights be infringed."

50. On the premise that at least one of the offences covered by the EAW was not an extradition offence, Mr Hall submits that the speciality principle will be breached if Mr Enasoaie is returned pursuant to the EAW. He accepts that the burden is on a requested person to show on the balance of probabilities that appropriate speciality arrangements are not in place in the requesting state: see *Kucera v Czech* Republic [2008] EWHC 414 (Admin) at [59]. He further accepts that Article 117(2), on its face, applies the Framework Directive. He submits, however, that the information now before the court, in particular in FI 3, shows that Romania will probably not be able to disaggregate the non-extradition offences from the extradition offences in respect of the resulting sentence of 5 years' imprisonment. Mr Enasoaie will accordingly be imprisoned for an offence committed before his surrender other than an offence for which he was surrendered. The speciality arrangements in Romania are therefore not effective to ensure compliance with Article 27(2) of the Framework Directive, and there will be a breach of section 17 of the Act.

51. Mr Hall submits that *Brodziak* should be distinguished because in that case there was evidence of a possible remedy before the Polish courts. He relies on *Edutanu* as showing that the position is different in Romania.

52. The primary submission of the JA is that all the offences covered by the EAW were extradition offences and accordingly no speciality issue arises. If, however the issue does arise, Miss Malcolm submits that there is no bar to extradition in this case. Article 117 fulfils Romania's obligation under article 27(2) of the Framework Decision, and the information provided in FI 4 and FI 5 confirms that there are arrangements in place which ensure that Romania complies with its obligations and gives full effect to the principle of speciality. FI 4 makes clear that if a requested person is discharged on some of the offences within a merged sentence, the delegated judge shall submit an appeal against the enforcement of the sentence, and the requested person may also do so. The court hearing such an appeal will then consider whether the resulting sentence could be disaggregated in order to enforce it only in respect of the sentences for the extradition offences. There is no compelling evidence that Romania has acted in breach of international obligations.

Section 2 of the Act: the submissions

53. Section 2(2) of the Act defines a Part 1 warrant as an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains, amongst other information, the statement referred to in subsection (5) and the information referred to in subsection (6). The statement required by subsection (5) in one that –

> "(a) the person in respect of whom the Part 1 warrant is issued has been convicted of an offence specified in the warrant by a court in the category 1 territory, and
>
> (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence."

The information referred to in subsection (6) includes –

> "(e) particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offence, if the person has been sentenced for the offence."

54. Article 8.1(c) of the Framework Decision (2002/584/JHA) requires a European arrest warrant to contain, amongst other information –

> "(c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2".

55. In *Goluchowski v District Court in Elblag, Poland* [2016] UKSC 36 ("*Goluchowski*") the Supreme Court confirmed at [26] that it is necessary to satisfy Article 8(1)(c) in a conviction case.

56. Mr Hall submits (again, on the premise that at least one of the offences covered by the EAW was not an extradition offence) that in the light of FI 4, the EAW does not contain particulars of an enforceable judgment. On the contrary, FI 4 says that the relevant judgment is "impossible to enforce, due precisely to the application of the specialty principle" Mr Hall relies on *Criminal Proceedings against Bob-Dogi* [2016] 1 WLR 4583 as showing that a failure to comply with Article 8(c) must in principle result in the court not giving effect to the warrant. Even if a future appeal under the Article 598 procedure might at some stage in the future result in an enforceable decision, there was and is no currently enforceable judgment.

57. Miss Malcolm (again, emphasising that this issue should not arise at all, because all of the offences covered by the EAW were extradition offences) submits that the requirement of section 2(6)(e) of the Act have been fulfilled: the EAW set out the particulars of the sentence which has been imposed in Romania. Article 8(1)(c) requires that a warrant shall contain evidence of an enforceable judgment: the EAW contained that evidence, and it would not become invalid if extradition were ordered on some but not all offences. The judgment remains enforceable in accordance with the principle of speciality, and it matters not if a further decision must be made in Romania as to the extent to which the warrant can be enforced. The EAW was issued on the basis of an enforceable judgment. It would be curious if, when the District Judge found that three of the offences were not extradition offences, the warrant became unenforceable: that would involve a circular process in which the judge first found that section 2 was satisfied; then considered section 10; and then returned to section 2 to find that it was no longer satisfied.

Analysis

58. We have to decide whether any of the challenged decisions by the DJ was wrong: see *Love v Government of the United States of America* [2018] EWHC 172 (Admin) at [26]. We begin with the issue raised by the original grounds of appeal and cross-appeal.

Section 10 of the Act

59. The starting point is that each of the six offences concerned was an offence of embezzlement contrary to a provision of Romanian law which makes such an offence punishable with imprisonment from 1 to 15 years (and more if the offence had extremely serious consequences). We would not expect such a penalty to be prescribed for the appropriation by an employee of his employer's property in circumstances which do not involve dishonesty, and we are therefore surprised by the statement in FI 2 that such offences "do not belong to the category of those committed by dishonesty". However, the CPS did not obtain any clarification of that statement, and for the purposes of this appeal it is accepted on behalf of the respondent that the Romanian offence does not involve proof of dishonesty as a necessary ingredient of the crime. We therefore assess the issue by reference to the test in *Assange* and *Cleveland*.

60. Applying that test, we have no doubt that Miss Malcolm's submission is correct: it is clear from FI 3 (and the accompanying information about the offences) and FI 6 that the only reasonable inference to be drawn from the facts of the offences is that Mr Enasoaie acted dishonestly. He took money which he knew belonged to his employer and used it for his own gain. In the words of FI 3, he misappropriated the money, with guilty intent. In relation to offences (i) and (ii) he put forward an innocent explanation,

but the Romanian criminal court found his account to be untrue. Moreover, the offences of embezzlement were occurring during the same overall period as the offences of forgery by which he attempted to cover up some of his misappropriations of money. It is, in our view, artificial to focus only on one word in the description of an offence ("appropriated" or "collected") without also having regard to the full circumstances of the offences of embezzlement shown by the EAW and the further information.

61. The DJ drew a distinction between offences (i), (ii) and (xi) on the one hand, and offences (vii), (viii) and (ix) on the other hand. The basis on which he did so appears to have been that in the latter trio of offences, but not the former, the description of the conduct in the EAW included a statement that Mr Enasoaie's actions caused loss to his employer. With respect to the DJ, we are unable to agree that that was a sufficient basis. The details in the EAW state that in offence (i), Mr Enasoaie collected money and did not pay it into his employer's account; in offence (ii), he collected and appropriated various amounts of money; and in offence (xi) he appropriated money "at the expense of the same passive subject". All of those descriptions connote personal gain to Mr Enasoiae and commensurate loss to his employer. In his witness statement (see [10] above), Mr Enasoiae admitted that he had committed a series of similar offences and made no suggestion that during the same period of time he embezzled money in a way which somehow did not cause loss to his employer. In those circumstances, the decisions as to each of the six offences should in our view have been the same.

62. But even if the DJ was entitled, on the evidence before him, to draw the distinction he did, the subsequent further information makes it unarguably clear that all the offences involved dishonesty, and all were extradition offences. We accept Miss Malcom's submissions in this regard. The DJ's decision to discharge Mr Enasoiae on offences (i), (ii) and (xi) was therefore wrong. He was correct to find offences (vii), (viii) and (ix) to be extradition offences. It follows that the original ground of appeal fails, and the cross-appeal succeeds.

63. That is sufficient to dispose of the appeal because, as we have indicated, Mr Hall readily acknowledges that his further grounds of appeal are contingent upon our having found that at least one of the offences was not an extradition offence. We have hesitated before embarking upon what will be *obiter dicta* in relation to those further grounds of appeal. We have, however, been told that the issue of speciality in circumstances such as these has been the subject of different approaches in decisions at first instance, and that assistance on that issue may therefore be welcome.

Section 17 of the Act

64. When an offender has to be sentenced for a number of offences, it may often be the case that simple addition of the sentences which would be appropriate for each individual offence, if viewed in isolation, will result in a total sentence which is unjust and disproportionate to the seriousness of the offending as a whole. In England and Wales, the Sentencing Council's definitive guideline on Totality sets out overarching principles to be followed by judges and magistrates when sentencing for more than offence but does not suggest that those principles can be expressed in, or reduced to, an arithmetical formula. FI 3 (quoted at [21] above) shows that Romanian law adopts a different approach to the cumulation of sentences: "the hardest sentence plus an increase of 1/3 of the total of other sentences". That approach results in a single final

sentence: not, as in England and Wales, in a number of discrete sentences which are ordered to be served either concurrently or consecutively.

65. The submission on behalf of Mr Enasoaie was that the resulting sentence cannot be disaggregated so as to avoid his serving any part of that sentence in respect of offences (vii), (viii) and (ix), which were said not to be extradition offences. The consequence of that submission, if correct, would seem to be that a Romanian offender who was subject to a resulting sentence imposed for multiple offences, not all of which were extradition offences, could not be returned to serve any part of his sentence because he could not be returned to serve all of it. That would lead to surprising results. It would mean, for example, that an offender who had been convicted of one offence could be returned to serve his sentence, but an offender who had convicted of multiple offences, all but one of which were extradition offences, could not be returned. It would mean that the principle of speciality, which protects a returned person against punishment for anything other than the offences in respect of which he has been extradited, would be used as a means to prevent his serving any sentence for his extradition offences.

66. It is unfortunate that the manner in which Romania deals with a resulting sentence, in circumstances where an offender has been extradited on some but not all of the offences covered by a warrant, did not emerge with immediate clarity from the further information initially provided by the JA. We understand why Mr Enasoiae attaches importance to the statements in FI 3 that Romanian law "does not provide for the possibility of the 'disaggregation' of sentences" and that "the final warrant issued as a result of the merger will not be able to be enforced". Those words must, however, be read in the context of the remainder of that part of FI 3, in particular its reference to avoiding a result which would be unfavourable to the defendant. When FI 3 is read as a whole, we understand it to mean (a) that a resulting sentence, reflecting all the offences covered by a warrant, cannot be enforced against a defendant who has only been extradited for some of the offences; and (b) that it is not possible to disaggregate the resulting sentence so as to restore the original separate sentences if, cumulatively, they will lead to imprisonment for longer than the final sentence. Neither of those restrictions necessarily means that the Romanian courts are powerless to enforce the appropriate total sentence for the offences in respect of which a defendant has been extradited.

67. That understanding is strengthened by the later further information. FI 4 (see [27] above) confirms that the reason why the final sentence cannot be enforced in full is "due precisely to the application of the specialty principle". It goes on to describe the appeal procedures by which "the Court would be able to decide, to what extent, the punishments ordered against the convict, could actually be enforced". FI 5 (see [29] above) is to similar effect.

68. The further information demonstrates that Romania does have in place effective arrangements to comply with its international obligations as to speciality. Article 117 directly implements Article 27(2) of the Framework Directive, and Article 598 provides a remedy if there is an obstacle to enforcement of the resulting sentence. Whether there is such an obstacle will no doubt depend on the details of an individual case and the length of the sentences for individual offences which were taken into account in calculating the resulting sentence. The important point, however, is that the further information shows Romania to have complied with its international obligations as to

speciality and to have put in place effective arrangements to implement the principle of speciality.

69. Mr Enasoiae has not been able to adduce any compelling evidence to the contrary. The reports of Dr Mares do not contain any clear evidence that Article 598 cannot be used as a means of ensuring that a returned person will only serve his sentence for the offence(s) for which he was extradited. Indeed, Dr Mares refers to a case in which Article 598 was used in that way. Other cases to which Mr Hall invited our attention do not in our view support his argument. The decision in *Edutanu* turned on the specific information provided in that case and does not in our view assist Mr Enasoaie in the circumstances of this case. We are not persuaded that there is any evidence of there being any real problem in practice in ensuring that the principle of speciality is observed. Mr Hall realistically acknowledged that in order for his submissions to succeed, the court would have to be able to distinguish *Brodziak*. In our view, there is no basis on which we should do so. Although that case was concerned with Polish legislation, it is apparent from the passage which we have quoted at [47] above that the court saw no objection in principle to a sentence being enforced "only in so far as it relates to the offences for which the requested person has been extradited".

70. We are unable to accept the submission that the terms of FI 4 and FI 5 leave open the possibility that an appeal court in Romania might consider the matter pursuant to Article 598 but uphold the sentence in its entirety. There is in our view no compelling evidence that such a decision might be made in circumstances where exclusion of the sentences for any non-extradition offences should lead to a reduction in the resulting sentence. There is no compelling evidence that Romania, having put in place effective arrangements to implement the principle of speciality, will then abandon that principle.

71. For those reasons, if it had been necessary for us to decide this ground of appeal, we would have rejected it.

Section 2 of the Act

72. We deal with this point briefly. We accept Miss Malcom's submission that the requirements of section 2 have been met: the EAW contained the necessary particulars of "the sentence which has been imposed". We are not persuaded by Mr Hall's submission that although valid and enforceable when issued, the EAW would cease to be enforceable if extradition was refused in respect of one or more offences. If that argument were correct, it would again mean that the principle of speciality would have the effect of preventing a defendant from being returned to serve his sentence for the offences in respect of which he would otherwise be extradited. We cannot accept that an EAW which is enforceable at the start of an extradition hearing becomes unenforceable, on this basis, by the end of the hearing.

73. Accordingly, if it had been necessary for us to decide this ground of appeal, we would have rejected it.

Conclusion

74. For the reasons we have given, the appeal fails and is dismissed. The cross-appeal succeeds and is allowed. Mr Enasoaie must accordingly be returned to Romania to serve his resulting sentence for all the offences.