

# Crime brief



‘Trans people are likely to be highly apprehensive about being sentenced to a term of imprisonment because of concerns about safety and also about access to any medically necessary hormonal support...’

The judge then held as follows. It was common ground that the extradition engaged the appellant’s right to respect for private life under Art 8, ECHR, but the district judge had found

## David Walbank KC examines the relevance of gender identity within the context of extradition requests

### IN BRIEF

- ▶ Law and politics.
- ▶ Transgender women in the prison estate.
- ▶ Society’s changing mores.

The borderlands between law and politics are endlessly fought over. The front lines are constantly shifting. Similar dilemmas can have very different outcomes, depending on whether battle is joined in a court of law, or in the rather more fickle court of public opinion.

This phenomenon is strikingly illustrated by the controversy which, in the view of many, elevated some embarrassing polling data into a full-scale resignation issue for the first minister of Scotland, Nicola Sturgeon. If nothing else, it seems to prove that in politics, as in life, timing is everything. Having found herself on arguably the wrong side of the debate about the incarceration of transgender females in women’s prisons, the hitherto untouchable leader of the Scottish National Party would doubtless look with a quizzical eye on the recent decision of the Administrative Court in *Prusianu v Braila Court of Law* [2022] EWHC 1929 (Admin).

### The background

Nicoletta Prusianu was a transgender woman of Roma ethnicity. Her pronouns were ‘she/her’. She was born in Romania in 1999 and was now in her early twenties. She had lived as a woman since she was a young teenager. In Romania, she had been on the receiving end of abuse and discrimination both at school and from members of the public, and she suffered depression as a result. When she was 14 years old, she began hormone treatment, which lasted for nearly three years. Eventually, she moved to Denmark and later still to the UK, by which time she had undergone medical procedures including facial and body hair removal and breast, cheek and bottom implants. By the time of the judgment—the subject of this ‘Crime

brief’ article—she had a settled life in the UK and was in a relationship with a male partner, who lived and worked in Denmark. Although they lived apart, he would occasionally visit her in the UK, and he supported her financially.

The proceedings arose because Prusianu was alleged to have embarked, over a ten-month period in 2018 and 2019, on a shoplifting spree, which ended up with her being arrested in her home country on no fewer than five separate occasions. In 2020, by which time she had moved to Denmark, she was convicted in her absence on all charges and sentenced to 12 months’ imprisonment. Then, in 2021, she was arrested in the UK on an extradition arrest warrant. Her extradition to Romania was ordered by a district judge but she appealed against that decision, contending that it would breach her rights under Arts 3 and 8 of the European Convention on Human Rights (ECHR).

### The court’s ruling

In handing down the judgment of the Administrative Court, Mr Justice Fordham quoted at length from the *Equal Treatment Bench Book* (February 2021), including the following passage:

‘Awareness, knowledge and acceptance of trans people has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour, and many transgender people experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives. Many trans people avoid being open about their gender identity for fear of a negative reaction from others. This applies in all contexts, but particularly when out in public because of safety issues. Social isolation, social stigma and transphobia can have serious effects on trans people’s mental and physical health...’

that removal would not be a disproportionate interference with that right. The question for the Administrative Court was whether the question of proportionality ought to have been decided differently, or ought now to be decided differently, on the ground that certain critical factors should have weighed very differently in the district judge’s assessment.

There were strong public interest considerations which militated in favour of the UK complying with its international extradition treaty obligations, particularly where the appellant had limited ties to the UK and had already been convicted by the Romanian courts and received a custodial sentence. However, there was evidence here of an obvious ‘protection gap’ in the assurances which the UK government had received about the treatment of transgender women within the Romanian penal system. Specifically, although the Romanian authorities did provide protection for vulnerable prisoners, the regime included a 21-day quarantine period during which the appellant would be at real risk of being placed in a men’s prison. There was also evidence before the court that the prison authorities in Romania would treat the appellant as a gay man instead of a transgender woman, ostensibly breaching the requirement under Art 8, ECHR to respect the appellant’s gender identity. Given the relatively petty offences for which the appellant had been convicted and given that the Romanian authorities appeared not to recognise her gender identity, extradition *would* be a disproportionate interference with these Art 8 rights. The Administrative Court, therefore, allowed the appeal and halted the extradition.

It is trite to say that the decisions of judges will reflect the mores of the society they serve. But how are judges to respond when society’s views sometimes seem to be in a state of constant flux?

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