Neutral Citation Number: [2022] EWHC 55 (Admin)

Case No: CO/3955/2020

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 14/01/2022

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

MAREK VAJDIK **App**

- and –

BRATISLAVA DISTRICT COURT (SLOVAKIA) **Respo**

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- -

Graeme Hall (instructed by **National Legal Services Solicitors**) for the **Appellant**

Jonathan Swain (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: 9 November 2021

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Approved Judgment

Mr Justice Chamberlain:

Introduction

1
The appellant, Marek Vajdik, renews his application for permission to appeal against the decision of District Judge Zani ("the judge") on 22 October 2020. The judge ordered the appellant's extradition to Slovakia pursuant to a European arrest warrant ("EAW") seeking his surrender for trial in relation to an offence of street robbery.

2
The application for permission to appeal came before Lane J on the papers on 16 February 2021. He granted permission to appeal on ground 1, which alleged that the EAW represented a wholesale failure to comply with the requirements of s. 2 of the Extradition Act 2003 ("the 2003 Act") and/or was

an abuse in the sense identified in Zakrzewski v Poland [2013] UKSC 2, [2013] 1 WLR 324. He refused permission on ground 2, which alleged oppression contrary to section 14 of the 2003 Act and ground 3, which was that extradition would be a disproportionate interference with Mr Vajdik's rights under Article 8 of the European Convention on Human Rights and so contrary to s. 21A of the 2003 Act.

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The application for permission to appeal on grounds 2 and 3 was renewed. It was due to be heard together with the appeal on ground 1. The hearing was listed on 11 June 2021 before Jay J. He gave a reserved judgement dismissing ground 1 and directed that the renewed application for permission to appeal be considered at a separate hearing, with the appeal to take place immediately if permission were granted.

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The appellant now proceeds with his renewed application for permission to appeal on ground 3 only, noting that the test of proportionality under Article 8 is less stringent than the test for oppression/ injustice under s. 14.

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It follows that the only issues before me today are the application for permission to appeal and, if permission is granted, the appeal on ground 3 (Article 8).

The facts

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The offence for which the appellant is sought is a street robbery carried out with another. The EAW alleges that on 5 August 2012 the victim was assaulted, a mobile phone worth EUR 360 stolen and spectacles worth EUR 60 broken.

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The relevant chronology is as follows. In March 2013 the appellant moved to the UK. On 9 May 2013 he was, in the terminology of the further information supplied by the judicial authority, "accused" of the criminal offence. On 25 January 2014, his co-defendant was convicted and sentenced to 1 year and 8 months' imprisonment. In February 2016, the appellant met his current partner. In June 2017 they had a daughter. On 5 March 2019 a domestic arrest warrant was issued in Slovakia. On 13 February 2020 the EAW was issued. It was certified by the National Crime Agency on 28 February 2020. The appellant was arrested under the EAW on 18 April 2020. The extradition hearing took place on 19 August 2020. The judge gave his written reasons for ordering extradition on 22 October 2020.

The judge's judgment

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The judge considered s. 21A of the 2003 Act between [69] and [86] of his judgment. At [70], he noted that the allegations against the appellant were "serious" and that if the appellant were to be convicted of like conduct in the UK, a prison sentence may result. This meant that extradition would not be disproportionate in terms of s. 21A(1)(b).

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At [72]-[81], the judge set out the relevant law on Article 8 in the extradition context. He referred to Norris v Government of the USA (No. 2) [2010] UKSC 9, [2010] 2 AC 487, HH v Italy [2012] UKSC 25, [2013] 1 AC 338 and Celinski v Poland [2015] EWHC 1274 (Admin), [2016] 1 WLR 551.

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Applying the balance-sheet approach approved in Celinski , the judge identified the following factors in favour of extradition at [84]:

“(i) There is a strong and continuing important public interest in the UK abiding by its international extradition obligations.

(ii) The seriousness of the offence that the requested person faces. It appears to be a very unpleasant joint enterprise robbery where violence was used, injuries inflicted and property stolen.”

11
At [85], the judge identified the following factors against extradition:

“(i) MV says that he has been settled in the UK since 2013.

(ii) He states that until the Coronavirus pandemic took hold he had been in regular employment, and indeed has produced documents by way of corroboration. He has fixed rented accommodation where he resides with his wife and their child. He has concerns as to the adverse effect that extradite will have on his family emotionally and financially.

(iii) MV states that he has led a law-abiding life since settling in the UK.

(v) He asserts that he is not a fugitive from justice.”

There was no (iv).

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At [86], the judge recorded his finding that extradition would not be disproportionate. He gave the following reasons:

(i) It is very important for the UK to be seen to be upholding its international extradition obligations. The UK is not to be considered a ‘safe haven’ for those sought by other Convention countries either to stand trial or to serve a prison sentence.

(ii) In my opinion, the offence details as set out in the EAW are serious and unpleasant and, in the event of a conviction in the UK for like criminal conduct, a prison sentence of some length may well be imposed.

(iv) MV is not currently in paid employment and is in receipt of UK state benefits.

(v) It is appreciated that there will be hardship caused to the requested person and to his wife and their child. However, that of itself is insufficient to prevent an order for extradition from being made.

(vi) This court has weighed in the balance and borne in mind the period of time that has passed since the alleged criminal conduct is said to have occurred but does not accept that the IJA has been guilty of any culpable delay in seeking his return. In all the circumstances, the time period involved, does not tip the balance in favour of extradition being Article 8 disproportionate.”

There was no (iii).

The appellant’s criticisms of the judgment

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Graeme Hall, for the appellant, submits that the crucial error was the judge's treatment of the delay on the part of the prosecuting authority. In particular, it is said that the judge: (i) under-analysed the impact of the delay; (ii) failed to identify that the appellant was not at fault for it; and (iii) failed to conclude that the delay was culpable.

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Mr Hall relies on a number of authorities. In Dabrowski v Poland [2017] EWHC 179 (Admin), the Divisional Court allowed an appeal against the decision of a judge ordering the requested person's extradition for a street robbery committed in 2008. Charges were laid in 2008 but no European arrested warrant was issued until 2014. At [37], Treacy LJ (with whom Nicol J agreed) said the judge's approach to delay had involved "a degree of under-analysis". Whilst he had identified the period involved, he had done little more than that. He had failed to analyse delay in the context of its impact upon the appellant and his family.

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At [44], Treacy LJ continued as follows:

"It seems to me that the undoubted very significant weight which should be attached to the public interest considerations of extradition can properly be said to be somewhat lessened by the delay of 6 years. Whilst I would be prepared to accept it would not immediately have been apparent to the Polish authorities that the appellant had left the country, there ought to have been an earlier point at which this was apparent. In the absence of explanation, notwithstanding ample opportunity for doing so, I consider that a fair conclusion to reach. The consequence of this is that I would regard it as some indication of a lesser degree of importance attached to the offending, with a concomitant diminution in the weight to be attached to the public interest."

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In Lysiak v Poland [2015] EWHC 3098 (Admin), the appellant was sought to serve a sentence of imprisonment for a fraud committed between 2000 and 2001. There was a very significant delay of more than nine years before the trial at first instance and then a further period of more than two years until the appeals' process was concluded. Burnett LJ (with whom Hickinbottom J agreed) said this at [31]:

"The important feature is that none of that delay can be laid at the door of the appellant. Furthermore, there is nothing about the circumstances of the proceedings as disclosed in the papers before us which suggests that they were especially complicated."

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At [32], Burnett LJ held that the judge had misdirected himself as to the relevance of the long delay. This meant that the balance had to be struck afresh. Taking into account the appellant's age at the time of the offending (25), the fact that he had committed no further offences, had been in gainful employment and the "financially parlous situation" of his wife and the impact on a child who had been at school in England since the age of 5, extradition was disproportionate.

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Lysiak was cited with approval by Lord Lloyd-Jones, giving the judgment of the Supreme Court in Konecny v Czech Republic [2019] UKSC 8, [2019] 1 WLR 1586, at [57].

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In Rybak v Poland [2021] EWHC 2021 (Admin), the requested person was sought to serve a sentence imposed in 2015 for offences committed in 2006. Sir Ross Cranston, sitting as a High Court Judge, said this at [26]:

“The focus of this court, under the leading case of Polish Judicial Authorities v Celinski [2015] EWHC 1274 (Admin), is on whether the District Judge was wrong in his conclusion. As the Divisional Court said in that case, it is rarely, if ever, necessary to cite appeal decisions in other Article 8 cases since these are invariably fact-specific. However, in giving the Supreme Court’s decision in Konecny v District Court in Brno-Venkov, Czech Republic [2019] UKSC 8, [2019] 1 WLR 1586, Lord Lloyd-Jones noted the approach of the Divisional Court in Lysiak v District Court Torun, Poland [2015] EWHC 3098 (Admin), where the Divisional Court had attached considerable weight to the nine years which the criminal proceedings in Poland took to come to a trial in that case and the further two years it took for the conviction to be confirmed in appeal proceedings.”

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The appeal in Rybak was allowed because the judge’s attention had not been drawn to the court’s treatment of delay in Lysiak or to the Supreme Court’s approval of that approach in Konecny .

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Mr Hall submits that the same error can be seen in the judgment here. The judge failed to focus on the delay between the alleged offence and the issuing of the domestic warrant (6 years, 6 months) or the delay in issuing the European arrest warrant (7 years, 7 months), for which there was no adequate explanation. This means that the Article 8 balance has to be struck afresh.

22
Mr Hall makes twelve points which, taken together, he says show that extradition would be a disproportionate interference with his Article 8 rights. First, the offending is now nine years old. The delay reduces the public interest in extradition. Second, the delay is culpable. This indicates that a lesser degree of importance is attached by the requesting state to the offending and means that the wait to be attached to the public interest in extradition is less. Third, the appellant is not a fugitive so the public interest in ensuring that the UK is not a safe haven for fugitives does not arise and the judge was wrong to refer to it as a factor in favour of extradition. Fourth, none of the delay can be laid at the appellant’s door and this is a factor of considerable importance. Fifth, there was nothing about the circumstances of the proceedings which suggested that they were complicated: see Lysiak at [31]. Sixth, had the case been prosecuted promptly, the appellant would not have left Slovakia before serving any sentence imposed on him. He would not have met his partner in 2016 and they would not have had their daughter in 2017. Seventh, at the time of the alleged offending the appellant was 20 years old. This was a factor regarded as important by Burnett LJ in Lysiak . Eighth, although the offending was not trivial, it was not of the gravest kind. Ninth, the appellant is the primary carer for his young daughter. She is at a crucial age where she needs her father’s emotional and financial support. Tenth, the appellant’s extradition would leave his wife and child in a very difficult position. His wife cannot speak English. Eleventh, the appellant has been in employment and has not offended in the UK. Twelfth, although he currently has settled status, the appellant faces real uncertainty as to whether he will be able to return to the UK following any extradition.

The respondent’s submissions

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For the respondent, Jonathan Swain submits, first, that the judge was entitled to rely on further information from the judicial authority. This was to the effect that “[t]here was no delay in the decision

to prosecute" and "[t]hrough the period between the date of the offence and the EAW being issued all the process was focused on to finding [the appellant]". The judicial authority added: "Many lustration in PATROS (system for search of people) were made, as well as Slovakian arrest warrant was issued on 05.03.2019". Although something appears to have gone wrong with the translation here, it is tolerably clear that it means that there were many attempts to find the appellant using the system available to the Slovakian authorities for this purpose.

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Mr Swain notes that the judge accepted this information at [64] and was entitled to find the delay not culpable. He placed reliance on the decision of the Divisional Court in RT v Poland [2017] EWHC 1978 (Admin), [2017] 4 WLR 137, at [62], where Burnett LJ (with whom Ouseley J agreed) said this:

"It is a frequent submission that someone has been living in the United Kingdom openly, often having had contact with various official bodies here. But neither the foreign judicial authority nor the NCA can be expected to explore the byways and alleyways of British officialdom to discover whether someone is in this country."

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Second, the judge was well aware of the changes in the appellant's life since these offences, as can be seen from his analysis of the arguments under s. 14 of the 2003 Act: see [67] of his judgment.

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Third, the evidence showed nothing in this case going beyond the ordinary hardship that would be caused by extradition of a family man.

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Fourth, the relative immaturity of the appellant was taken into account when considering the passage of time.

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Fifth, the judge expressly took into account the fact that the appellant had been employed until the pandemic and that he had led a law-abiding life.

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Sixth, the judgment contains express reference to the appellant's concerns that extradition would have an adverse affect on his wife and child, both emotionally and financially.

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As regards the impact of Brexit, Mr Swain relies on a judgement of mine in Pink v Poland [2021] EWHC EWHC 1238 (Admin), in which I said this at [52]:

"I accept on the basis of the appellant's latest evidence that there is a prospect that, if extradited, the appellant may not be readmitted to the UK after completing his sentence; and that this would put his current partner (who has settled status) in the difficult position of having to leave if she wishes to continue the relationship. But I do not think that this can properly be regarded as a consequence of extradition. It is, rather, a consequence of (i) the appellant's criminal convictions in Poland and (ii) the change to the immigration rules as a result of Brexit."

Discussion

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There are two features of this case which make it somewhat unusual. The first is that the appellant is not a fugitive. Indeed, when he left Slovakia in March 2013, he had no reason to suppose that there were proceedings against him and no obligation to inform the authorities of his new address, or even that he was going to the UK. Second, it was the appellant's uncontradicted evidence that he did not know of the proceedings later brought against him until he was arrested pursuant to the EAW, some 7 years and 7 months after the date of the alleged offence. The consequence of these features is that, when the appellant entered into the relationship with his partner and started a family, neither he nor his partner could have known that he was sought for trial in respect of an offence in Slovakia. This is not, therefore, a case in which the appellant's family life in the UK has been "built on sand", as is sometimes said.

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These features are an important starting point for any assessment of the proportionality of extradition. The appellant is not to blame for the delay between the date of the alleged offences and the issue of the EAW. However, unlike in Lysiak , where the criminal proceedings took more than 9 years to come to trial and a further period of more than 2 years on appeal, the delay in this case between the date of the alleged offence (August 2012) and the point when the appellant was "accused" (May 2013) was just 9 months. That cannot in itself be regarded as excessive, but nor can it plausibly be suggested that the appellant left Slovakia to evade justice. The focus of enquiry must be on what happened after the appellant was "accused".

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As to that, the judicial authority had informed the court that there had been many attempts to locate the appellant using a system designed for this purpose. The judge was entitled to accept that as true. The fact that some explanation was given means that the analysis of the delay cannot be identical to that in Dabrowski , where the authority had given no explanation at all, despite having ample opportunity to do so. Nonetheless, the explanation in this case leaves a number of matters unclear. What exactly did the use of the PATROS system involve? If it had failed to identify the appellant's location on one occasion why was it reasonable to suppose that it would do so on a subsequent occasion? What else (if anything) was done to attempt to locate the appellant in Slovakia, once it became clear that he was not at the last known Slovak address (which was included in the EAW)? Why was there a gap of nearly 6 years from the point when the appellant was "accused" to the point when the domestic warrant was issued? This latter question seems particularly pertinent. Presumably, it was considered that the issue of a warrant might enable the authorities to find the appellant. If so, why was it not done earlier?

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The judge did not ask these questions. He accepted at face value the assertion of the judicial authority that "through the period between the date of the offence and the EAW being issued all the process was focused onto finding [the appellant]". In my judgment, there is force in Mr Hall's submission that this aspect of the case was "under-analysed" as Treacy LJ put it in Dabrowski . The failure to consider the questions I have identified in [33] seems to me to vitiate the judge's conclusion, recorded at [64], that "there is no (or insufficient) evidence to suggest that there was any delay – let alone any culpable delay – on the part of the IJA in seeking his extradition".

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In my judgment, the evidence before the court plainly established delay in seeking extradition and (in the absence of material addressing the questions identified at [33] above) made it proper to conclude, as in Dabrowski at [44], that "there ought to have been an earlier point" at which it was apparent that

the appellant was not, or may not be, in Slovakia. The judge should have found that the judicial authority was, to that extent, culpable for the delay.

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Since this was on any view a fundamental part of the judge's Article 8 analysis, and it was flawed, it falls to me to conduct the Article 8 balancing exercise afresh: see Dabrowski , [39]; Lysiak , [32]. I have applied the principles enunciated in Norris , HH and Celinski in the light of my conclusions at [35] above.

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There are two factors which militate in favour of extradition: the public interest in honouring extradition treaties and the seriousness of the offence. As to the latter, this was a robbery committed with another which involved violence as well as loss and damage to property. The appellant's co-accused received a significant custodial sentence; and such a sentence might well have been imposed if the appellant had been convicted of the offence in this jurisdiction. These are both powerful factors which should be given considerable weight, despite the fact that there has been delay, which is culpable to the extent I have indicated.

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The factors which militate against extradition are these. First, the appellant was only 20 years old at the time of the alleged offence; he is now 29. It is now well established by research that young people mature in their twenties: see e.g. Attorney General's References (Clarke, Andrews and Thompson) [2018] EWCA Crim 185, [2018] 1 Cr App R (S) 52, [5] (Lord Burnett CJ). In this case, the appellant has not offended since 2012 and has been in employment since his arrival in the UK (with a break during the pandemic). This reduces to some extent the weight that can be given to the public interest in his extradition, but it certainly does not extinguish it entirely.

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Second, the appellant cannot be blamed for the delay. The requesting state can, to the extent I have identified. It is necessary, however, to consider carefully what flowed from the culpable element of the delay. Mr Hall's case (see paragraph 43 of his skeleton argument) was that the decision to prosecute should have been taken sooner than 9 months after the date of the alleged offence; and that if it had the appellant would not have left Slovakia, or begun his relationship or started a family. I have already rejected the submission that 9 months was too long a period in which to decide to prosecute. The culpable delay came after that. The EAW could and should have been issued before February 2020. But a requesting state must be entitled to take some time trying to locate a suspect on its own territory before issuing an EAW. Given the timescales seen in many extradition cases, it is difficult to think that the requesting state could have been regarded as having delayed excessively if it had issued the EAW by the end of 2016. But the appellant's partner must already have been pregnant with their daughter by then. So, it is not possible to conclude, as Mr Hall invites me to, that but for the requesting state's culpable delay, the appellant would not have entered into a serious relationship in the UK or started a family.

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Third, there is the effect of extradition on the appellant and his partner and daughter. As to the appellant himself, I accept that extradition to Slovakia would impose a substantial emotional burden on him. But there is no evidence of any impact on his health. The main thrust of his evidence is that he came to the UK to better himself and to start a family and he fears that they will have worse prospects if they have to return to Slovakia.

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The appellant’s partner has filed evidence that she has a hearing impairment and will find it difficult to cope without the appellant. Without further detail as to the nature of the impairment or its effects on her, it is difficult to give a great deal of weight to this factor. The appellant’s partner says that, if the appellant were extradited, she would have to go back to Slovakia, where it would be difficult for her to find work because she is of Roma ethnicity and would suffer discrimination on that account. Again, in the absence of any further evidence or explanation, I cannot place much weight on this factor. Slovakia is a Member State of the EU and a contracting party to the ECHR. Both EU law and the ECHR impose obligations on it to provide remedies for any discrimination against her on grounds of ethnicity. There is no evidence beyond the appellant’s partner’s assertion to counter the presumption that the requesting state will comply with these obligations.

42
The appellant’s daughter was 2 years old when the EAW was issued and is 4 years old now. Again, I accept that the emotional effect of the appellant’s extradition on her will be substantial, particularly if it results in conviction and a custodial sentence. However, her age means that she will be more able to adapt to life in Slovakia, if her mother decides to take her back to that country.

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On the facts of this case, the impact of Brexit is a factor which can properly be taken into account. Unlike Pink , this is an accusation case. If he is not extradited, the fact that he has been accused of an offence in Slovakia is unlikely to affect his settled status. If extradited and convicted, it is possible that he will be unable to return. Whether he can or not may depend on the sentence imposed. In any event, I would not place much weight on the possible immigration consequences of a conviction and sentence in Slovakia, not only because they are uncertain, but also because the UK Government is entitled to take such matters into account in deciding on the immigration status of foreign nationals. In a case such as this, where the appellant’s partner has said that she would return to Slovakia if the appellant were extradited, it would be wrong for the appellant to be shielded by Article 8 from the possible immigration consequences of a conviction and sentence in Slovakia.

44
The question whether extradition represents a disproportionate interference with the appellant’s Article 8 rights is more finely balanced than the judge thought. However, performing the balancing exercise myself, I conclude that the factors in favour of extradition still outweigh those against.

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I shall therefore grant permission to appeal, but dismiss the appeal.

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