Neutral Citation Number: [2021] EWHC 958 (Admin)

Case No: CO/329/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2021

Before:

LADY JUSTICE CARR DBE
and
MRS JUSTICE CHEEMA-GRUBB DBE

- -

Between:

ANOLICA DUMITRACHE	**Appellant**
- and -	
OFFICE OF THE PROSECUTOR OF THE REPUBLIC ATTACHED TO THE COURT OF PORDENONE, ITALY	**Respondent**

- -
- -

Benjamin Seifert (instructed by **Lansbury Worthington Solicitors**) for the **Appellant**
David Perry QC and Catherine Brown (instructed by the **Extradition Unit, Crown Prosecution Service**) for the **Respondent**

Hearing date: 25 March 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am 23 April 2021."

LADY JUSTICE CARR DBE:

Introduction

1. The Appellant, Anolica Dumitrache, is a 30 year old Romanian citizen. His extradition is sought by the Respondent public prosecutor from the United Kingdom to Italy pursuant to two conviction European Arrest Warrants ("the EAWs") arising out of various criminal offences committed by the Appellant in Italy, a Part 1 territory for the purpose of the Extradition Act 2003 ("the 2003 Act").

2. The Appellant was arrested on both EAWs on 21 May 2019. Following a final hearing on 12 November 2019, on 20 January 2020 District Judge Goldspring ("the District Judge") ordered his extradition to Italy pursuant to s. 21(3) of the 2003 Act. This is his appeal pursuant to s. 26 of the 2003 Act against that order.

3. Following the grant of leave to appeal by Spencer J on 15 July 2020, two grounds of appeal are before the court:

   i) In relation to s. 20 of the 2003 Act ("s. 20"): the District Judge erred a) in finding to the criminal standard that the Appellant was present at the trial resulting in the decision the subject of the second EAW ("EAW 2") and b) in finding that the Appellant would be entitled to a retrial in the event that he was not deliberately absent from his trial on the offences the subject of EAW 2;

   ii) In relation to s. 21 of the 2003 Act ("s. 21"): the District Judge erred in finding that surrender of the Appellant would not constitute a violation of Article 8 of the European Convention on Human Rights ("Article 8").

   The Appellant also contends that he has been granted permission to challenge the District Judge's findings in relation to the first EAW ("EAW 1") on the same grounds (albeit by reference to different facts).

4. The appeal is resisted in full. It is said that the District Judge reached the correct conclusion, principally for the reasons that he gave. There is also an (unopposed) application by the Respondent to adduce fresh evidence in respect of further information provided by the Italian authorities dated 11 March 2021.

5. Given the date of the Appellant's arrest (before 31 December 2020), the issues fall to be decided by reference to the law applicable before the end of the transition period governing the United Kingdom's departure from the European Union.

6. This constitution also heard the appeal in *Domi v The Public Prosecutor's Office, Court of Udine (an Italian Judicial Authority)* [2021] EWHC 923 (Admin) ("*Domi*"), a case which likewise turned on the correct application of ss. 20 and 21 in the context of conviction European Arrest Warrants seeking surrender of an individual appellant to Italy. Whilst the issues raised on each appeal are not identical, they are set against the same general contextual background, and the appeals were heard on consecutive days. Mr Perry QC and Ms Brown appeared for the Respondent on each appeal. Different counsel represented the Appellants: Mr Hickman QC and Mr Grandison for Mr Domi, and Mr Seifert for the Appellant, but these counsel collaborated (and were instructed by the same solicitors).

The Facts

7. The Appellant was born in Targu Jiu, Romania, on 22 June 1990.

8. The circumstances in which he came to be in Italy have not been revealed. But on 26 September 2012 he and another purchased an Audi A4 vehicle that had been stolen on 23 September 2012 ("the EAW 1 offence").

9. His trial in relation to the EAW 1 offence took place on 12 November 2014 before the Asti court. According to EAW 1, the Appellant did not appear in person but he was represented by a court-appointed defence lawyer. He was convicted and sentenced to a suspended custodial term of one year and four months, and fined €600. The judgment became irrevocable on 2 March 2015.

10. The offences the subject of EAW 2 are said to have been committed by the Appellant on 24 October 2015 ("the EAW 2 offences"). The Appellant burgled a company plant in Pravisdomini and stole 102 pallets of wood with a value of €4,000. He also attempted to steal a further 60 pallets, but was prevented from doing so by the intervention of the police. He was found to be in possession of a 40cm long metal crowbar and a counterfeit testing certificate.

11. He was arrested the next day. Following a hearing on 26 October 2015 he was remanded in custody. At a hearing on 4 November 2015 attended by the appellant in person, the defence requested the judge to proceed on the basis of an abbreviated trial (*rito abbreviato*) pursuant to which, if convicted, a defendant is entitled to a one-third reduction in sentence.

12. That hearing took place on 9 November 2015. The Appellant (and his co-defendant) were in prison at this stage and indicated that they did not want to participate. The Appellant was represented. He was convicted. There is a debate, explored below, as to what happened beyond conviction at this hearing.

13. On 10 (or 11) November 2015 the Appellant was released from custody subject to a prohibition order preventing him from being in "the territory of the Court of Pordenone". Upon his release, the Appellant nominated Avv. Luciano Rizzo, a lawyer practising in Pordenone, as his domicile.

14. The judgment of 9 November 2015 became irrevocable on 5 January 2016 and on 18 January 2016 an imprisonment order was issued for the Appellant to serve a term of 11 months and 12 days' imprisonment.

15. The Appellant returned to Romania shortly after his release. He says that he then met his partner. They had a son, born on 12 May 2017.

16. In May 2018 police discovered the Appellant to be living in Romania.

17. At some point later in 2018, the Appellant came to the United Kingdom "for a better life", followed shortly by his partner and son. He and his partner now work in Kent for the same company, he as a fork lift truck driver and she as a packer. He pays the rent and household bills. Were he to be extradited, he says that his partner and son would not manage financially. His partner would have to give up her job to care for her son.

18. He must have arrived in this country by 2 November 2018, because on that date he stole from a motor vehicle in Kent, for which he received a police caution the next day.

19. On 19 February 2019 an order of aggregation of the Appellant's sentences was issued in Italy: namely a total sentence of two years, three months and 12 days' imprisonment (together with a fine of €1,000) for the purpose of both EAWs ("the aggregation order"). As set out above, the Appellant was arrested in this country on 21 May 2019.

The EAWs

EAW 1

20. EAW 1 relates to the offence of handling stolen goods on 26 September 2012.

21. Box B indicates that the decision on which the EAW is based is an enforceable judgment of the Asti Court of 12 November 2014 which became irrevocable on 2 March 2015.

22. Box C indicates that a custodial term of one year and four months was imposed, together with a fine of €600. After the aggregation order, two years, three months and 12 days remain to be served and the total fine was €1,000.

23. Box D states that the Appellant:

> "[1. Yes, the person appeared in person in custody at the trial re…was present in that he was incarcerated for these facts (he was arrested *flagrante delicto* and released on 11 November 2015). Defence counsel appointed by the Court[1].]
>
> 2. **No, the person did not appear in person at the trial resulting in the decision. The sentenced person was not present and had a court-appointed counsel. He had been stopped immediately after the facts and submitted to police identity card**." (original emphasis in bold)

24. Box E indicates that the EAW 1 offence took place before and until 26 September 2012 and sets out the details of the offending.

25. The Framework List was not ticked.

26. Pursuant to a request for further information, the following further information was provided: the trial took place in the absence of the Appellant, who was represented by a court-appointed defence lawyer upon whom documents were served. He had not been arrested. The sentence imposed was originally suspended but then activated as a result of the conviction on the EAW 2 offences.

[1] This paragraph appears to have been inserted in error – it is taken from the entry in Box D on EAW 2, as set out below.

EAW 2

27. EAW 2 relates to the offences committed on 24 October 2015 of aggravated burglary, attempted theft, use of a false document and unjustified possession of a metal crowbar.

28. Box B indicates that the decision on which the EAW is based is an enforceable judgment of the Court of Pordenone of 9 November 2015 which became irrevocable on 19 February 2016.

29. Box C indicates that a custodial term of one year was imposed, together with a fine of €400. After the aggregation order, two years, three months and 12 days remain to be served and the total fine was €1,000.

30. Box D stated:

> "1. Yes, the person appeared in person at the trial resulting in the decision. The [Appellant] was present in that he was incarcerated for these facts (he was arrested flagrante delicto and released on 11 November 2015). Defence counsel appointed by the Court."

31. Box E indicates that the EAW 2 offences took place on 24 October 2015 and sets out the detail of the offending.

32. Pursuant to a request for further information the following further information was provided:

    i) The Appellant was arrested on 25 October 2015 in *flagrante delicto* by Carabinieri officers of Portogruaro, together with another (Lulu Cristian Gheorge ("Gheorge"));

    ii) On 26 October 2015 he was taken while in custody before the Judge (in Pordenone) to stand summary trial (*processo per direttissima*). After acknowledging the Appellant's decision not to make statements in his defence, the Judge confirmed his arrest and remanded him in custody;

    iii) The trial then commenced and was postponed to 4 November 2015 at the defence request;

    iv) The Appellant attended court on 4 November 2015. The defence asked the Judge to proceed on the basis of an abbreviated trial (*rito abbreviato*);

    v) At a hearing on 9 November 2015 the Appellant (and Gheorge) indicated that they did not want to participate;

    vi) After hearing the prosecution and defence, the Judge delivered a judgment of conviction;

    vii) On 10 November 2015, following compensation for damages to the victims, the Judge released the Appellant and "replaced imprisonment with a prohibition of domicile on the territory of the Court of Pordenone";

viii) Upon release, the Appellant elected domicile with the law firm of a defence lawyer of his choice, Avv. Rizzo, practising in Pordenone;

ix) The judgment was not challenged and became final;

x) On 18 January 2016 an imprisonment order was issued for the Appellant to serve a custodial term of 11 months and 12 days but he could no longer be traced in Italy;

xi) Information as to the Appellant's whereabouts was sought from the Romanian authorities. On 15 May 2018 his address in Romania was passed on by the police of Oradea;

xii) The revocation of the conditional suspension of sentence was requested and obtained with respect to the EAW 1 offence, and an imprisonment order for a total sentence of 2 years, 3 months and 12 days was issued;

xiii) The EAWs were issued in the belief that the Appellant was in Romania, but the Appellant was arrested in the United Kingdom.

33. With the reference to the possibility of a retrial the Respondent stated:

i) Article 175 of the Code of Criminal Procedure ("Article 175") states:

> "The public prosecutor, the private parties and the defence lawyer shall be restored in the previous deadline if they can prove that they could not comply with the set time limit for a fortuitous event or force majeure. The request to be restored in the previous deadline shall be submitted within ten days of the day on which the circumstances amounting to a fortuitous event or force majeure ceased. The request set forth in paragraph 2 above shall be submitted, failing which entitlement lapses, within thirty days of the date on which the defendant came to have effective knowledge of the proceedings. In case of outgoing extradition requests, the term for submitting the request starts on the date of surrender of the convicted person."

ii) The Court of Turin would be the authority with jurisdiction to decide on the restoration of a previous deadline;

iii) The Appellant was very unlikely to be restored in relation to the EAW 2 offences pursuant to Article 175, considering that he personally attended the trial.

The decision to order extradition

34. The District Judge handed down a full written judgment ("the Judgment"). Having set out the procedural background, he first recorded his decision to rule inadmissible the evidence of Avv. Capellupo, on which the Appellant sought to rely, to this effect: that the Italian authorities, in general, do not issue European Arrest Warrants for surrender for sentences of less than six years. That evidence was contained in a paragraph in a

report which had in fact been commissioned and written to address an (abandoned) challenge under s. 2 of the 2003 Act (to the validity of the EAWs).

35. The Appellant contended that this evidence was relevant to his Article 8 challenge. The Respondent objected on the basis that the evidence did not assist with the Article 8 balancing exercise. The court could take judicial notice of dealing with "many Italian requests for less than 6 years to serve".

36. The District Judge identified the four questions to be asked in assessing the admissibility of expert evidence (in line with *R v Harris* [2005] EWCA Crim 1980) and concluded that the evidence would not assist him in determining the balancing exercise under Article 8. The fact that in general the Italians do not issue EAWs for surrender on custodial sentences of less than six years was irrelevant. The fact was that here the Italian authorities had done so. The EAWs fell to be considered with the principles of mutual trust and confidence in mind. What was generally true was of no assistance. The evidence was thus inadmissible, falling at the first hurdle.

37. The District Judge satisfied himself that the EAWs were valid and that the requests were made in respect of extradition offences. He then moved onto the matters in issue. He set out the law, including ss. 20 and 21, Article 4a of the Council Framework Decision 2002/584/JHA (inserted by Council Framework Decision 2009/299/JHA) ("Article 4a") ("the 2002 Framework Decision"), Article 8 and relevant authorities. Next he turned to the evidence, including that of the Appellant and his partner. Amongst other things, the Appellant accepted that it was likely that he had been present at the trial on 4 November 2015. He stood by his statement that he had been told by his solicitor in November 2015 that he had to leave Italy (as opposed to Pordenone) and was never allowed to come back. The Appellant stated that he was informed that he had been banned from Italy. When he called his Italian lawyer, Avv. Rizzo, a few weeks after his release, he was told that he had nothing to worry about.

38. As to whether or not the Appellant was a fugitive, the District Judge identified that there was a conflict on the evidence. It was clear that the Appellant was excluded only from Pordenone; however the Appellant stated that he was told that he was banned from Italy (which is why he left Italy). His case was that he was not therefore seeking to hide. The Appellant's account was uncorroborated and there had been no explanation as to why no evidence had been adduced from Avv. Rizzo in support. The District Judge did not accept that the Appellant was told that he was banned from Italy or believe that he was so banned:

> "…firstly it is [il]logical that he would be banned from a country where he had ongoing proceedings and a sentence of imprisonment to serve, secondly his account is uncorroborated and thirdly, ultimately I did not believe him. I am satisfied so that I am sure that he left for Romania to avoid these proceedings and is a fugitive from the 18th January 2016.";

39. In relation to EAW 1, the Appellant accepted his presence at the trial on 12 November 2014 where he was convicted and sentenced. He was not tried in his absence for the purpose of s. 20.

40. In relation to EAW 2, the issue was whether the "trial" was the hearing that he attended on 25 October, adjourned at his request and in which he then chose not to participate

on 9 November 2015 or the hearing on 19 February 2019. Having referred to *Ardic* C-571/17 PPU and *Foster-Taylor v Italy* [2019] EWHC 2938 (Admin) ("*Foster-Taylor*"), the District Judge concluded that the "trial" was the hearing in October and November 2015, not February 2019. All that took place in February 2019 was the mathematical calculation of adding the sentences together and deducting time spent on remand. It was a decision relating to execution or application of previously imposed custodial sentences.

41. Thus the Appellant was present at the "trial" for the purpose of EAW 2 sufficiently for s. 20 purposes. He was not absent and could not rely on s. 20. The District Judge went on to say:

> "If, however I am wrong about that I am satisfied that he would be entitled to a re-trial, the combination of the further information and the decision in *Nastase v Italy* [2012] EWHC 3671 make that clear."

42. Having rejected the challenge under s.20, the District Judge addressed the Article 8 challenge. He considered [8] to [12] of *Polish Judicial Authority v Celinski and others* [2015] EWHC 1274 (Admin); [2016] 1 WLR 551 ("*Celinski"*) and set out the various factors to be balanced, including the interests of children as a primary consideration.

43. He identified the following factors in favour of surrender:

    i) The very high public interest in ensuring that the United Kingdom honours its extradition arrangements;

    ii) The public interest is further enhanced when relatively lengthy custodial sentences are left to serve;

    iii) The Appellant was a fugitive and it should be clear that the United Kingdom cannot be seen as a safe haven for those seeking to avoid justice;

    iv) The decisions of the judicial authority of a member state as to its sentencing policy should be accorded a proper degree of mutual confidence and respect.

44. He identified the following factors against extradition:

    i) The Appellant had a partner and young child whose Article 8 rights were also engaged;

    ii) There had been some delay, seven and four years from the dates of the offending;

    iii) The Appellant had served almost eight months in custody. (This was in fact incorrect, but an error made in the Appellant's favour).

45. The District Judge did not accept that the offences should not be treated as serious. It was hard to see how the harm that would be caused to the child by the Appellant's surrender was more than was inevitable in all separation cases. His partner was in a well-paid job (earning some £1,600 net per month). She might have to make

adjustments to her work and accommodation, but the child was still young. There would be a financial hardship but not such that it would be impossible for his partner to survive in his absence. There would also be emotional hardship, though not severe. The harm to the family was not such as to outweigh the public interest. As for delay, having referred to the authorities, the District Judge could not accept that a fugitive who deliberately avoids the criminal proceedings and flees the jurisdiction could then rely on delay unless some feature such as a significant change in circumstances or delay so culpable as to be close to an abuse existed. In this case, the Appellant was transient in Europe and it simply took time for the Italian authorities to catch up with him. The delay was relevant but it was built primarily on his fugitive status.

46. It was clear to the District Judge that none of the factors against surrender either individually or cumulatively were so compelling that they outweighed the public interest. He proceeded to make the order for extradition.

Grounds of appeal

S. 20

47. Mr Seifert for the Appellant submits that he has been granted permission to pursue an appeal in relation to EAW 1 as follows:

   i) The court of the executing state is bound to take statements and information in the EAW at face value: *Zakrzewski v Regional Court in Lodz, Poland* [2013] 1 WLR 324 at [8]. None of the information provided by the judicial authority supports the contention that the Appellant was either present, deliberately absent or represented by a lawyer of his choosing at his trial resulting in the decision in relation to the EAW 1 offence which, according to EAW 1, was the decision of 2 March 2015;

   ii) Further, the Appellant stated in his examination in chief that he had had no lawyer when he appeared in court. He was asked to pay and paid €600.

48. In relation to EAW 2:

   i) The trial resulting in the decision cannot be 9 November 2015 because there is no evidence that any sentence was imposed on that date. The further information states that any term of imprisonment was "replaced" by the territorial prohibition. The relevant date can only be 5 or 18 January 2016 with subsequent activation or aggregation on 19 February 2019. There was an ongoing trial process, unfamiliar to the English courts, but the practice in Italy (as recognised in *Caldarelli v Court of Naples, Italy* [2008] UKHL 51; [2008] 1 WLR 1724 at [24] per Lord Bingham). It is not known what, if any, sentence was passed on 9 November 2015 but it could not have been the final sentence, having been "revoked" and then followed by the sentence imposed on 18 January 2016. This cannot be said to have been a situation where a final sentence was imposed and then amended;

   ii) There is no evidence that he instructed a lawyer to represent him at the trial resulting in the decision even though he was represented by a lawyer on 9 November 2015 when he attended court because that was not the trial resulting

in the decision. The further information only states that he had nominated Avv. Rizzo as his "domicile" (which concerns only the question of service and issue of correspondence). The statement in Box D of EAW 2 that the Appellant was represented by a court-appointed lawyer clearly refers to the hearing on 9 November 2015 (and not any final hearing in January 2016);

iii) The Appellant was not deliberately absent from any hearing in 2016 because there is no evidence that he could have been aware of one. The District Judge was wrong to make what is said to be the allied finding that the Appellant was a fugitive from justice.

49. Further, in what were unheralded oral submissions, Mr Seifert sought to challenge the District Judge's findings (including that the Appellant was in any event entitled to a re-trial such as to answer the question in s. 20(5) in the affirmative, applying the reasoning in *Nastase v Office of the State Prosecutor, Trento, Italy* [2012] EWHC 3671 (Admin) ("*Nastase"*)). He referred to two recent decisions - *TR v Generalstaatsanwaltschaft Hamburg* C-461/20 PPU (*"TR"*) and the decision of Fordham J in *Ogreanu v Italian Judicial Authority* [2020] EWHC 1254 (Admin); [2020] 1 WLR 4080 ("*Ogreanu*") - in support of the contention that *Nastase* has been "superseded".

50. In a supplemental note directed by the Court, it was further submitted for the Appellant that *Ogreanu* supported his challenge in relation to EAW 1, where it is said that there are conflicting pieces of information: a statement that the judgment became "irrevocable" in March 2015 and yet re-trial is not ruled out. Further, the Respondent's position on re-trial pursuant to Article 175 in relation to the EAW 1 offences is said to be at odds with the contention that he was present at his trial on those offences. More generally, the court is invited to confirm the correctness of the decision in *Ogreanu* (at [50]) where Fordham J stated that the requirement on a defendant under Article 603(4) of the Code of Criminal Procedure ("Article 603") to "prove" that he could not be present at trial undermines the principles as to the burden and standard of proof in s. 206 of the 2003 Act.

S. 21

51. The Appellant submits that the following factors should have weighed in the balancing exercise to be conducted under Article 8 (in accordance with *Celinski*):

i) There was no evidence that the Appellant was a fugitive (and the District Judge was wrong to find that he was). He was lawfully released on 10 November 2015 and understandably moved back to his home country of Romania;

ii) He has already been punished for the offending: in relation to the EAW 1 offence he received a suspended sentence; in relation to the EAW 2 offences he was ordered to pay compensation to the victims;

iii) The offending is not serious;

iv) The significant passage of time since the offences were committed. The Respondent did not consider issuing an EAW until four years after his release from prison in Italy. He remained in Italy until December 2018. There is no explanation for the delay. The District Judge's approach to delay was also flawed

in principle; specifically he failed to consider *Konecny v District Court in Brno Venkov, Czech Republic* [2019] UKSC 8; [2019] 1 WLR 1586 ("*Konecny"*) where (at [57]) the Supreme Court confirmed that delay was clearly capable of being a relevant consideration in weighing the Article 8 balance in extradition cases;

v) Before his arrest in 2019 the Appellant was living with his partner and very young son;

vi) The Judge erred in excluding the passage of the report from Avv. Cappellupo to the effect that "in executive extradition, the practice is in the sense that the extradition request or the request for arrest for extradition purposes are not formulated, in general, in cases of prison sentences not exceeding 4 years". This was clearly relevant to the balancing exercise.

52. It is further said that the District Judge was wrong to embark on a comparative exercise by reference to other extradition cases (contrary to the guidance in *Celinski* at [14]).

Grounds of resistance

Fresh evidence

53. In the light of the granting of leave by Spencer J, and in response to his comment that it appeared that the sentence of 12 months' imprisonment was not imposed until 18 January 2016 (when the Appellant was not present), further information was sought from the Italian authorities which responded on 11 March 2021 as follows:

> "The Appellant was arrested on 25th October 2015 and was remanded in custody. On 26th October 2015 the Appellant was produced at court and the Appellant's continued detention in prison was ordered and the trial was initiated.
>
> At the request of the defence, the trial was adjourned until 4th November 2015 (the Appellant remained in prison from 26th October to 4th November).
>
> On 4th November 2015 the trial began. The Appellant was present at court, he was produced at court in custody. Upon the request of the defence, the trial was postponed until 9th November (the Appellant remained in custody until 9th November).
>
> On 9th November, the Appellant was present before the Judge, as he was accompanied in custody by the prison police. On this occasion the Appellant stated that he no longer wished to participate in the trial and was therefore taken back to prison. Italian law does not require the defendant to be present at the hearing and therefore, as was his right, he was taken back to prison.

> On 9 November, before being taken back to prison, the Appellant provided evidence that he had partially compensated for the damage and asked to be released. On 9 November at 12.50pm the judge pronounced the judgment of conviction in the presence of the court-appointed lawyer, by reading only the operative part of the judgment. As the Appellant chose to leave the courtroom, he was deemed present.
>
> On 10 November, the judge revoked the measure of custody in prison and replaced it with the measure of a ban on re-entering Pordenone. At 11.10am on 10 November [the Appellant] was released.
>
> Article 533(1) of the Italian Code of Criminal Procedure provides: "The court shall deliver a judgment of conviction if the accused is proven to be guilty of the alleged offence beyond a reasonable doubt. By means of the judgment, the court shall apply the penalty and any security measures.""

54. As already indicated, the Appellant (realistically) does not oppose the application to introduce this evidence (in the light of the general principles established in *Hungary v Fenyesi* [2009] EWHC 231 (at [32]) and the specific statement in *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin) (at [40]) to the effect that, where new evidence sought to be admitted merely confirms a factual finding made by the district judge, or clarifies an issue of fact or law that might otherwise be ambiguous or unclear, it may be straightforward to persuade the court that it is in the interests of justice to admit it).

S. 20

55. The Respondent objects to the attempt to appeal the order for extradition under EAW 1 by reference to s. 20 in the absence of permission to do so. But in any event, the Appellant stated in evidence before the District Judge that he was present when convicted and sentenced on 12 November 2014. Further, the District Judge was correct to hold that that the Appellant could lodge an application to "restore the previous deadline" to appeal under Article 175.

56. In relation to EAW 2, the District Judge was correct to identify the hearing on 9 November 2015 as the occasion on which the Appellant was not only convicted but also sentenced. The further information of 11 March 2021, read alongside Article 533 of the Italian Criminal Procedure Code ("Article 533"), puts the matter beyond doubt. It is clear that the sentence was imposed on 9 November 2015 when the Appellant was present at court (but chose not to remain in the courtroom to hear the verdict).

57. As for the Appellant's attempt to challenge the District Judge's finding that the Appellant would be entitled to a retrial for the purpose of s. 20(5) and reliance on *Ogreanu*, the Respondent contends that the decision in *Ogreanu* was wrong. It fails to keep separate the two distinct issues of English and Italian law.

The 2003 Act and the 2009 Framework Decision

58. S. 20 provides:

> "20 Case where person has been convicted
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.
>
> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) a review amounting to a retrial….
>
> (7) If the judge decides that question in the negative he must order the person's discharge.
>
> (8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights-
>
> (a) the right to defend himself in person or through legal assistance of his own choosing or, if he had no sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
>
> (b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

59. S. 21 provides:

> "21 Person unlawfully at large: human rights
>
> (1) If the judge is required to proceed under this section (by virtue of section 20) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).
>
> (2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.

> (3) If the judge decides that question in the affirmative he must order the person to be extradited to the category 1 territory in which the warrant was issued…."

60. Article 4a of the 2002 Framework Decision provides:

> "Decisions rendered following a trial at which the person did not appear in person
>
> 1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
>
> (a) in due time:
>
> (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the trial;
>
> and
>
> (ii) was informed that a decision may be handed down if he or she does not appear for the trial;
>
> or
>
> (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial; or
>
> (c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, which may lead to the original decision being reversed:
>
> (i) expressly stated that he or she does not contest the decision; or
>
> (ii) did not request a retrial or appeal within the applicable time frame; or
>
> (d) was not personally served with the decision but:

> (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed;
>
> and
>
> (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant."

Discussion and analysis

Relevant context

61. I refer to the judgment in *Domi* at [55] to [80] in particular where the relevant legislative and legal context is considered. That detail does not need to be repeated here.

EAW 1: s. 20

62. It is quite clear that the Appellant neither sought nor was granted permission to raise a challenge to extradition under EAW 1 by reference to alleged non-compliance with s. 20. The Perfected Grounds of Appeal do not include any such challenge. When asked to identify where they did, Mr Seifert for the Appellant could only point to the opening paragraph of the "Submissions" section as follows:

> "22. Whilst Mr Dumitrache said he was unaware of the conviction in relation to the offence on EAW 1 the further information indicates that he was made subject to a suspended sentence. This was revoked as a result of the conviction in EAW 2."

63. This is no more than background to the substantive submissions on s. 20 then made (exclusively) in relation to EAW 2. Spencer J likewise did not consider that the Appellant sought to raise any challenge to EAW 1 by reference to s. 20. He made no reference to any such attempt in what were his full reasons for granting permission (which identified expressly the grounds as he understood them to be). In these circumstances, Rule 50.17(4) of the Criminal Procedure Rules 2015 cannot avail the Appellant.

64. In any event, I am unpersuaded that a challenge by reference to s. 20 would have had any real merit. There is first the question of whether or not the Appellant was present in person at the date of the trial resulting in the decision on the EAW 1 offence, namely 12 November 2014, as he stated in evidence he was. Alternatively, taking the EAW 1 at face value, he was not present (in person) but represented and defended by a court-appointed lawyer. Further, the District Judge was entitled to conclude that the Appellant was entitled to a re-trial for the purpose of s. 20(5) on the basis of the further information supplied by the Italian authorities and by reference to *Nastase. Nastase* was good law at the time of the hearing before the District Judge. As discussed in more

detail below, I do not accept that it has been "superseded" by *Ogreanu* which in any event is not a decision without difficulty.

EAW 2: s. 20(1)

65. It is first to be noted that the Appellant's case on appeal is materially different to that advanced below. As reflected in his judgment, the District Judge was presented with a binary option for the relevant date of trial for the EAW 2 offences: 10 November 2015 or 19 February 2019, being the date of the aggregation order. His position now is that the relevant date for trial is either 5 or 18 January 2016. He (rightly) does not challenge the District Judge's finding that the aggregation order is irrelevant.

66. It is not in dispute that, if the relevant hearing was that which took place on 9 November 2015, the Appellant was present for the purpose of s. 20. He had attended court on 26 October, 4 November and 9 November 2015 (on this last occasion declining to participate further and so being returned to prison). The only question is whether not that hearing is to be treated as "the trial resulting in the decision".

67. In *Criminal proceedings against Tupikas* C-270/17 PPU; [2017] 4 WLR 188 ("*Tupikas*") the Court of Justice of the European Union ("the CJEU") held (at [70] to [74] and [77] to [79]) that Article 4a (and the 2002 Framework Decision generally where it deals with convictions):

i) Is only concerned with "final" convictions and sentences;

ii) Is engaged by decisions which result in "final" findings of guilt and also those which result in (final) imposition of penalties:

> "…the concept of "trial resulting in the decision" within the meaning of Article 4a(1) of [the 2002 Framework Decision] must be understood as referring to the proceeding that led to the judicial decision which finally sentenced the person whose surrender is sought in connection with the execution of a European arrest warrant."

68. *Tupikas* was followed in *Criminal proceedings against Zdziaszek* C-271/17 PPU; [2017] 4 WLR 189. There (at [82] and [93]) the CJEU stated:

> "82.…the concept of "trial resulting in the decision" within the meaning of article 4a(1)…must be interpreted as covering the appeal proceedings that led to the decision which, after a new examination of the merits of the case in fact and law, finally determined the guilt of the person concerned and imposed the penalty upon him…even though the sentence handed down was amended by a subsequent decision……
>
> 93…where, following appeal proceedings in which the merits of the case were re-examined, a decision finally determined the guilt of the person concerned and also imposed a custodial sentence on him, the level of which was however amended by a subsequent decision taken by the competent authority after it had exercised its discretion in that matter and which finally determined the sentence, both decisions must be taken into account for the purposes of the application of [Article 4a(1)].."

69. It is common ground that the question on the facts here is whether or not the Appellant was not only convicted of the EAW 2 offences at the hearing on 9 November 2015 but also then sentenced (finally) to a custodial term of one year (and fined).

70. In my judgment, it is clear on all the information now available that, as the District Judge held, the Appellant was indeed convicted and sentenced at the hearing on 9 November 2015 (such that he was convicted on the EAW 2 offences in his presence for the purpose of s. 20(1)):

   i) Box B of EAW 2 states clearly that the "enforceable judgment" is that of 9 November 2015 (becoming irrevocable on 5 January 2016);

   ii) The Schengen Information System likewise records the relevant decision reference number as follows:

      "SENTENCE NUMBER 1001/2015 RG – 1225/2015 REG. SENT – 985/2017 RG N- 446/2018 REG. SENT **ISSUED ON 09/11/2015** BY THE COURT OF PORDENONE ENFORCEABLE ON 05.01.2016"; (emphasis in bold added)

   iii) Conviction and sentence at the same time not only reflects what happened at the Appellant's trial on 12 November 2014 in respect of the EAW 1 offences, but is also consistent with the scheme identified in Article 533;

   iv) What happened subsequently to 9 November 2015 was not part of an ongoing sentencing (or continuing trial) process. Rather, the Appellant's release from custody on 10 November 2015 with imprisonment being "replaced" by a prohibition against staying in Pordenone is consistent with release (following his payment of partial compensation) subject to conditions (as to residence[2]) and with the election of a lawyer of domicile. It is not to be taken as revocation of or substitution for the original custodial sentence;

   v) There is no evidence whatsoever of any hearing (or other decision-making event at which the Appellant might be present either in person or through lawyers) for the purpose of issue of the imprisonment order of 18 January 2016 (enforcing the original custodial sentence). This makes sense in circumstances where the judgment of 9 November 2015 had already become irrevocable a fortnight or so earlier.

71. The challenge to EAW 2 by reference to s. 20(1) therefore fails.

<u>EAW 2: s. 20(3) and (5)</u>

72. In these circumstances, questions of deliberate absence (for the purpose of s. 20(3)) and the right to retrial (for the purpose of s. 20(5)) do not arise[3]. Further, the Appellant has neither sought nor been granted permission to challenge the District Judge's decision on the Appellant's right to re-trial by reference to *Ogreanu*. The decision in *Ogreanu*

[3] For the avoidance of doubt, the fact that the Italian authorities have stated that it was "highly unlikely" that the Appellant would be restored in relation to the EAW 2 offences under Article 175 would not have detracted from the fact that he would still have an entitlement to a retrial in a territory applying Article 6 principles of fairness.

was handed down after the Judgment but before the application for permission to appeal came before Spencer J on the papers; at no stage has there been any application to amend the grounds of appeal nor was the challenge identified in the perfected skeleton argument for the Appellant. The matter was raised for the first time orally at the appeal hearing.

73. However, in deference to the arguments advanced in that regard, I would wish to comment briefly on the recent decision of *Ogreanu* and its impact, if any, on *Nastase.*

74. In *Nastase* the Divisional Court considered Article 175. Having reviewed the authorities, Rafferty LJ commented (at [42]) that United Kingdom jurisprudence had consistently found Article 175 to be compatible with s. 20. She went on (at [45]) to say:

> "The existence of procedural steps does not remove the entitlement to a retrial. Rather, the Italian authorities must be permitted to regulate their own proceedings by imposition of their own rules. Section 20 may create entitlements, but procedural rules set parameters within which such rights are exercisable…"

75. Thus the existence of a procedural step did not detract from the unconditional nature of the legal right to a re-trial. This approach was approved by the Divisional Court in *BP v High Court, Maramures, Romania* [2015] EWHC 3417 (Admin) ("*BP*") (at 44]).

76. In *Ogreanu* the requested person was, like the Appellant, the subject of an Italian conviction EAW. He had been convicted in his absence. In the Magistrates' Court it was held that he had not been deliberately absent from his trial and he would be entitled to a re-trial in the event of his return to Italy. Thus the requirements of s. 20(5) were met and extradition was ordered. Mr Ogreanu's appeal against that decision came before Fordham J who allowed the appeal on the basis that the decision on entitlement to a retrial was not sustainable.

77. Having rehearsed the burden and standard of proof under s. 20, Fordham J set out what he described as the "three necessary ingredients" required to satisfy the retrial entitlement in s. 20(5): first, that the retrial involves an entitlement on the part of the extradited person to adduce evidence on the merits; secondly, that any limitation period on the exercise of the retrial right involves the running of time following extradition surrender; thirdly, that no burden would be placed on the extradited person to disprove deliberate absence from the original trial as a precondition to invoking the retrial entitlement – rather, it was for the prosecution to prove deliberate absence from trial, if the retrial entitlement was to be denied on that basis. He described these three ingredients respectively as the "evidence-adducing ingredient", the "prospective running of time ingredient" and the "prosecution-burden" ingredient.

78. He then interposed at [15] the common ground that the retrial entitlement could be one which was deniable by the requesting state on grounds of deliberate absence from trial. He stated that he did not need to hear argument on the permissibility of what he called a "contingent deniability", but commented (correctly) that [44] of *Nastase* supported it. He then repeated the common ground that the requesting state prosecuting authorities would need to bear the onus of proving deliberate absence from trial, with no onus on the requested person to disprove it.

79. Fordham J further addressed the question of retrial entitlement at [43] to [55]. At [50] he referred to Article 603 and the statement that the court shall also order a new trial hearing for the taking of evidence when the defendant, in absentia in the first instance trial, so requests "and proves that he could not be present for fortuitous events or force majeure or because he had no knowledge of the writ of summons, as long as the said circumstances not through fault of his own or, when the writ of summons for the first instance trial was served on defence counsel…and defendant did not voluntarily elude knowledge of the proceedings". Having examined the material from the Italian authorities, he concluded (at [54]) that he had been unable to identify any passages supplying the "evidential platform for a sustainable finding that the respondent had discharged the onus, to the criminal standard, of establishing the evidence-adducing ingredient, together with the prosecution-burden ingredient, of the retrial-entitlement".

80. Relying on *Ogreanu*, Mr Seifert submitted that, likewise in the Appellant's case, as a matter of Italian law the burden of proving that the defence could not "comply with the set time limit" is shifted impermissibly onto the extraditee. If the burden lies on the accused person under Italian law, then s. 20(5) cannot be satisfied, since it is for the requesting authority (and not the extraditee) to prove that the requirements of s. 20 are made out. The District Judge was thus wrong to conclude that the Appellant would be entitled to a retrial for the purpose of s. 20(5). Further, relying on [55] of *Ogreanu,* Mr Seifert submitted that if there is any lack of clarity as to the meaning and effect of the foreign law, the solution is to seek further information and submissions from the requesting authority.

81. Given that it is not necessary for me to determine the issue, and not having had the benefit of full argument on the point, I prefer not to express any concluded or firm view on the correctness of the decision in *Ogreanu.* However, I do hold the provisional view that *Ogreanu* was wrongly decided, for the summary reasons set out below.

82. There appears to me to be force in the submission that the judgment confuses what are properly to be treated as two distinct issues: first, who bears the burden of proof in establishing the various matters identified in s. 20 (as necessary on the facts); secondly, who bears the burden in Italy as a matter of Italian law of bringing him or herself within the conditions for obtaining a retrial.

83. As to the first, the burden lies on the requesting authority (to the criminal standard) (see *Cretu* at [34]). This, however, does not impose a burden of proof to be discharged in the Italian courts (or in the courts of any other requesting state). The material issue of Italian law (or issue of foreign law in the case of any other state) is whether there is an entitlement to a retrial. This may be a contingent entitlement, as was confirmed in *Nastase.* The second issue, namely who bears the burden of proof in Italy as a matter of Italian law, is irrelevant and not for the English courts to consider.

84. This analysis is consistent with the cosmopolitan approach identified in *Caldarelli v Court of Naples* [2008] UKHL 51; [2008] 1 WLR 1724 (at [7] and [23] per Lord Bingham). Surrender under the 2003 Act is a form of international co-operation between member states with different procedural regimes. It is not for the English courts to impose English practices on other member states before extradition can take place. As it is put succinctly for the Respondent, Italian criminal procedure is not to be treated as if it were English; this is not what s. 20 requires.

85. Further, I would not accept that *Nastase* no longer represents good law or has in some way been "superseded" by *Ogreanu*. Whilst referred to early on in the decision in *Ogreanu*, *Nastase* was not analysed in any detail but identified in passing only: Fordham J said in terms that he did not need to consider the question of the permissibility of a contingent entitlement to a retrial. He at no stage stated that he was departing from (or disagreeing with) the decision in *Nastase*: indeed, he treated it as correct on the issue that he was then addressing.

Article 8

86. I turn then to the Appellant's separate challenge by reference to Article 8.

87. As was the case in *Domi*, absent a material error of fact or approach in principle on the part of the District Judge, it is not for this court to conduct the *Celinski* balancing exercise afresh. As Spencer J commented when granting permission, the Appellant has an "uphill task" on this aspect of the appeal.

88. There was no such error of fact or approach. The District Judge's finding that the Appellant was a fugitive[4] is not sensibly open to challenge. The District Judge, who heard and saw the Appellant in the witness box, was fully entitled to disbelieve his evidence to the effect that he had been told (incorrectly) that he had been banned from Italy (and not merely Pordenone). Amongst other things, it was inherently unlikely that anyone, let alone his lawyer, would have told him this: it would have been quite inaccurate. Given then that it would have been a most surprising event, the District Judge was entitled to place weight on the fact that the Appellant's lawyer, Avv. Rizzo, did not corroborate the Appellant's evidence. Finally, whether or not the Appellant knew of the imprisonment order of 18 January 2016, he knew of his earlier conviction and sentence.

89. Equally, the District Judge's decision to exclude the evidence of Avv. Capellupo (as to the allegedly general practice of the Italian authorities in seeking surrender) cannot be impugned. The District Judge asked himself the right questions on admissibility. He was entitled to take the view that the evidence would not assist him in determining the balancing exercise. What may or may not have been generally true would not advance matters in circumstances where, self-evidently, here the Italian authorities had seen fit to seek extradition and in light of the applicable principles of mutual trust and confidence.

90. Beyond these matters, the District Judge was entitled to reject the submission (repeated on appeal) that the offences in question were not serious, and to consider that the Appellant's offending was serious - and sufficiently serious to warrant the imposition of custodial sentences in Italy. Whether or not the Appellant had paid compensation in Italy, the fact remained that significant custodial sentences remain to be served. Contrary to the submissions for the Appellant, the District Judge did not treat the question of delay as irrelevant: he expressly stated (more than once) that it was a relevant factor. It was an issue that he considered with care. (His references to the facts of other cases did not involve an inappropriate comparative exercise but rather a consideration of the impact of fugitive status on delay (as to which the Appellant makes

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[4] In accordance with the test identified in *De Zorzi v Attorney General Appeal Court of Paris* [2019] EWHC 2062 (Admin); [2019] 1 WLR 6249 at [48].

no criticism as a matter of substance)). Express reference and/or consideration to *Konecny* would not have altered his reasoning. Finally, the District Judge took into account the emotional and financial hardship that extradition would bring, and the interests of the Appellant's partner and young son.

91. In short, there is no basis on which to interfere with the District Judge's conclusion that none of the factors against surrender were either individually or cumulatively so compelling as to outweigh the public interest in extradition. I would therefore dismiss the challenge by reference to Article 8 as well.

Conclusion

92. For all these reasons I would dismiss the appeal.

Cheema-Grubb J DBE:

93. I agree.