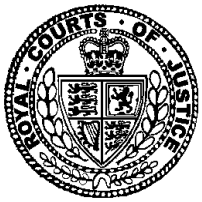

Neutral Citation Number: [2022] EWHC 2015 (Admin)

Case No: CO/4823/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before :

MRS JUSTICE McGOWAN

- -

Between :

Appellant

IONUT BURGHELEA

- and -

Respondent

BUCHAREST TRIBUNAL ROMANIA

- -
- -

JONATHAN SWAIN (instructed by **Lloyds PR Solicitors**) for the **Appellant**

DAVID BALL (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 8 December 2021

- -

Approved Judgment

This judgment was handed down by Mrs Justice McGowan remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10.30 on 29.07.2022

MRS JUSTICE McGOWAN:

1. The appellant, Mr Ionut Burghelea, is a citizen of Romania. He was born on 27 March 1975. His extradition is requested pursuant to a European Arrest Warrant, ("EAW"). Romania is a category 1 country for the purposes of the Extradition Act 2003, ("the 2003 Act").

2. He appeals against the decision of District Judge Hamilton, ("the judge"), of 21 December 2020, sitting at Westminster Magistrates' Court, ordering the appellant's extradition pursuant to s.21(3) of the 2003 Act.

3. On 22 January 2020, the respondent, the Bucharest Tribunal, Romania, issued an EAW. It was certified by the National Crime Agency, ("NCA") on 27 February 2020. It is a conviction warrant. The warrant seeks the extradition of the appellant to serve the whole term of a custodial sentence of three years and eight months for offences of fraud. This is an extradition offence under s.65 of the 2003 Act.

4. The appeal is now being pursued under s.20(2) of the 2003 Act, leave having been granted by Chamberlain J on the sole ground that the District Judge erred in not discharging the appellant because he was not present at his trial and would not be entitled to a re-trial. Chamberlain J further stayed consideration of leave to appeal on two further grounds under s.2 of the 2003 Act and Article 3 of ECHR, pending a resolution in the case of *Marinescu & ors.*

5. The judge found that the appellant was a fugitive, the appellant argues that the finding was in error and, in any event the true test to be applied was whether he was deliberately absent from his trial. It is accepted that two lawyers did appear at various stages of the proceedings: one a state appointed lawyer and the other a privately appointed lawyer, Mr Marian Lungu. A clear dispute of fact arises on the question of representation by Mr Marian Lungu.

6. The issue of fact is whether the appellant was represented by a lawyer of his choice at his trial. Further whether his desire to attend via a video-link, which was not met, means that even if he had had chosen representation to that point, it ceased to be effective. In addition, it is said that he had no right of appeal because the decision of the court was served on him at an address in Romania, when he was detained in the USA.

7. This court is asked to consider whether the District Judge erred in his application of s.20 of the 2003 Act and Articles 4a of the Council Framework Decision 2002/584/JHA ("the 2002 Framework Decision") (as amended by the Council Framework Decision 2009/299/JHA ("the 2009 Framework Decision"), in the context of his findings on the facts.

8. The appellant appeals pursuant to s.26 of the Act. By s.27(2), this court can only allow an appeal if it is satisfied that the decision under appeal is wrong:

> *"(a) the appropriate judge ought to have decided a question before him at the extradition hearing differently;*
>
> *(b) if he had decided that question in the way he ought to have done, he would have been required to order the person's discharge."*

9. There is also an application by the appellant to adduce fresh evidence. He applies to adduce the evidence, described as an expert report, of Mihail-Iulian Nitu, the lawyer who appeared before the court in Romania at the appeal stage. That application is resisted but the respondent is content that I consider the evidence de bene esse, in the first instance.

10. Mr Jonathan Swain appeared for the appellant and Mr David Ball for the respondent. I am very grateful to them for their helpful written and oral submissions.

EAW

11. The offending occurred in 2008 and proceedings began in 2011. The proceedings were suspended and re-started. He was convicted in 2018, that conviction was declared final on 20 December 2019 by the Bucharest Court of Appeal.

12. He was said to have joined a criminal group engaged in defrauding a bank by the fraudulent purchase of land using forged documents; obtaining a loan by the use of forged documents and using forged identity documents to facilitate the frauds. The loss on the loan was €506,000. He was sentenced to a term of three years and eight months, all of which remains to be served.

13. It is common ground that the appellant had moved to the USA before proceedings were commenced in 2011 and, at the time of his trial, because he was a protected witness there, was unable to leave without the consent of the USA authorities. He came to the UK on 28 February 2020 and was arrested on arrival.

History of Proceedings in Romania

14. The request for further information was answered in considerable detail in a reply dated 8 April 2020. That sets out the history of the investigation and proceedings in Romania.

    i) A warrant was issued on 12 May 2011 and the appellant was arrested in absentia.

    ii) On 16 January 2012 the court in Bucharest found that the conditions for requesting the appellant's extradition from the USA were fulfilled.

    iii) There were 14 hearings, between 16 July 2013 and 5 November 2014 at which the appellant was represented by a court appointed lawyer.

    iv) 15 further "judicial review (administrative)" hearings were "set" between 25 February 2015 and 19 October 2016, without summoning the parties.

    v) Attempts were made in 2016 and 2017 to hold further administrative hearings by video link to allow the appellant to attend remotely.

    vi) Romania requested the extradition of the appellant from the USA. He was not extradited.

    vii) The appellant appointed a lawyer of his own choice, Marian Lungu and gave him a power of attorney on 13 February 2018. (Blf no. 028962/13.02.2018).

viii) The EAW states that, **"At the first hearing held in public session on 2 May 2018, the freely-chosen defence counsel of the defendant Burghelea Ionut, lawyer Marian Lungu, stated that he could not provide additional information regarding the situation of the defendant in the USA, where he had a special status, that of "protected witness", and that he was unable to provide data regarding a possible desire of the defendant to benefit from the simplified procedure, because he claimed to be innocent, and the communications with him were by phone or using the WhatsApp application."**

ix) At the same time the court considered that it was appropriate to commence proceedings under the **"simplified procedure, in the case of admission of guilt".** The court requested that the lawyer communicate with the appellant by telephone, e-mail or WhatsApp to inform him of the procedure in the event of an admission of guilt.

x) At a second hearing on 15 May 2018 the appellant's appointed lawyer told the court that he had discussed matters with the appellant both by telephone and via WhatsApp. It appears that the appellant was interested to discover whether the losses in the case in Romania would all be covered in the proceedings. The lawyer told the court that he had been instructed by telephone by the appellant and if necessary, he could prove to the court that he was employed by the appellant.

xi) At the third hearing 23 May 2018 the appellant's lawyer revealed that since the earlier hearing he had had further discussions with the appellant, again, both by telephone and via WhatsApp. The appellant told him that his civil status documents had expired, and it was therefore impossible for him to provide the notarial declaration (mandate) which had been requested at a previous hearing. The appellant told his lawyer that the American authorities had granted him a 'new identity' for an indefinite period.

xii) The lawyer told the court that the appellant wanted to give the notarial declaration (mandate) which had been requested, and also to be heard by the court by means of a video conference.

xiii) A similar account was given by the lawyer on the fourth hearing on 30 May 2018, saying that the appellant had repeated that he wanted to be heard through a video conference.

xiv) At a fifth hearing on 8 June 2018 the court was told that the authorities in the US Ministry of Justice would be able to provide video link facilities in the near future. The lawyer requested that a new hearing date be set as "he was not authorised to present conclusions either on the procedure for the admission of guilt or on the merits of the case, as long as the defendant wanted to be heard before the court".

xv) On 15 June 2018 there was a sixth hearing. On that occasion the appellant was represented by a court appointed lawyer Constantin George. This appears to have arisen because the appellant's appointed lawyer had refused to present his conclusions on the merits at the previous hearing.

xvi) There was a seventh hearing on 29 June 2018 at which the appellant's appointed lawyer told the court he did not have the documents required to apply to re-docket the case. He told the court that a notary public in Arizona, USA had been appointed and that she was in fact a Romanian citizen.

xvii) At a final hearing on 6 July 2018 the court was informed that the American notary public confirmed that the appellant had attended before her on 15 June 2018 to consider the application of the simplified procedure. It seems from the further information dated 8 April 2020 that he told the American notary public that he wanted to follow the simplified procedure. In the course of the statement provided to the notary public in America the appellant had indicated a home address in Giurgiu, he did not provide any address in America or any other address for the service of documents.

15. The warrant states that the appellant was not personally present at the trial but at box (d) 3.2 that he, "being aware of the scheduled trial, has instructed a lawyer who was appointed by the person concerned, to defend him at the trial; "**He was represented by lawyer Mr Marian Lungu (within Ilfov Bar Association)-appointed lawyer of the defendant Burghelea Ionut based on the power of attorney series Blf no. 028962/13 February 2018 and the court-appointed lawyer Mr Constantin George having a power of attorney no. 0075240/21 May 2018 issued by Bucharest Bar Association-legal aid service which is mandatory for the case file;".**

16. Judgment was handed down on 6 July 2018. Notice of the judgement was served at the address in Giurgiu, Romania held by the court for the appellant. The court was aware that the appellant was at that time living in the USA. He had provided the address in Giurgiu in the past. The appellant had not informed the court in Romania of his address in the USA, either directly or through his lawyer. The court in Romania took the view that the obligation was on the appellant to provide an address for service in the USA and, given his failure to provide such an address, the court could only serve the judgment on the address held by them for the appellant in Romania.

17. Further information, dated 8 April 2020, states that **"In this case, the minutes was correctly served to the home address in Romania as well as by displaying it at the court's headquarters. It is true that the defendant actually lives in the territory of the United States of America, but he had the obligation to communicate the address where he lived. It is excessive to expect the first court to serve a decision through the authorities of a state (because the exact address is not known), given that the defendant, who has received the assistance of a freely-chosen lawyer, has not informed of that address. In practice, the defendant pleads guilty and has the obligation to communicate the address where he wants to be served with the judgment of the first instance court. Since the defendant has not fulfilled this obligation (the Court recalls that he benefited from the services of a freely-chosen lawyer, who should have explained to him his obligations and the consequences of the failure to comply with such obligations), he cannot invoke the fact that he was not served the minutes at his domicile address in the United States. In fact, even in the statement given before the notary in the United States stating that he wanted to follow the simplified procedure, the defendant indicated the address of Giurgiu as his home address, without mentioning his residence address in America or any other address where he wanted to be served the procedural documents. Only in May 2019 (more than half a year after the judgment was handed down) the**

defendant communicated to the first court a written statement requesting the court's reasons and indicating a US address, but this would not result in a re-docketing of an appeal the time limit of which had already expired.

We should point out that the relief from the effects of the expiry of the time for appeal is the procedural means by which the holder of the right of appeal who could not file an appeal for reasons that cannot be imputed to them regains the right he had lost after the expiry of the time limit for appeal. The relief from the effects of the expiry of the time for appeal requires the fulfilment of the following three conditions: the appeal must be filed after the expiry of the time limit provided by law, the delay in filing the appeal must have been determined by a solid cause to prevent the appeal the appeal must have been filed within 10 days from the beginning of the service of the sentence or civil damages.

If the 10-day time limit for the appeal starts from the service of the minutes of the decision handed down by the first instance court, if the minutes are found to not have been legally served, it means that the statutory period for appeal has not started and practically there is no time limit exceeded for the party to ask for a relief from the effects of the expiry of the time for appeal. The relief from the effects of the expiry of the time for appeal allows to remove the sanction of the interdiction of the right to carry out a procedural step for which the party exceeded the mandatory term stipulated by the law for its valid execution. The premise of analysing a request for relief from the effects of the expiry of the time for appeal is that of the validity of the procedural step determining the beginning of the period the non-observation of which leads to cancellation of that right."

18. After the judgment, a newly appointed lawyer, Nitu Mihail Iulian, appeared on behalf of the appellant and filed an appeal. On 20 December 2019 the appeal was dismissed as being filed out of time. The appeal was the first occasion on which an address in the USA had been provided by the appellant. Under domestic law the time limit in which to commence an appeal is 10 days which begin from the service of the minutes of the decision handed down by the first instance court.

19. The further information provided on 8 April 2020 further deals with the failure of the appellant to provide an address in the USA. Importantly Judge Cristea Cristina Maria includes in the information the following passage at page 9 of the document [T/B 129],

"it is true that the defendant actually lives in the territory of the United States of America, but he had the obligation to communicate the address where he lived. It is excessive to expect the first court to serve a decision through the authorities of a state (because the exact address is not known), given that the defendant, who has received the assistance of a freely chosen lawyer, has not informed of that address. In practice, the defendant pleads guilty and has the obligation to communicate the address where he wants to be served with the judgement of the first instance court. Since the defendant has not fulfilled this obligation (the court recalls that he benefited from the services of a freely chosen lawyer, who should have explained to him his obligations and the consequences of the failure to comply with such obligations), he cannot invoke the fact that he was not served the minutes at his domicile address in the United States.

In fact, even in the statement given before the notary in the United States stating that he wanted to follow the simplified procedure, the defendant indicated the address of Giurgiu as his home address, without mentioning his residence address in America or any other address where he wanted to be served the procedural documents. Only in May 2019 (more than half a year after the judgement was handed down the defendant communicated to the first court a written statement requesting the court's reasons and indicating a US address, but this would not result in a re-docketing of an appeal the time limit of which had already expired".

20. Article 466 of the Romanian Criminal Procedure Code states that a person who is tried in absentia and convicted, may apply for the criminal proceedings to be reopened no later than one month after the date on which he is informed, through any official notification, that criminal proceedings have taken place in their absence. However, a person who has appointed counsel or a representative shall not be deemed to have been tried in absentia if that representative appeared at any time during the criminal proceedings in court.

History in the USA

21. The appellant provided a witness statement from a US Attorney, Richard Donoghue, to the Judge in the Eastern District Court of New York asking for the assistance he had given to the US authorities to be taken into consideration in his sentencing exercise on his pleas of guilty to fraud, money laundering, identity theft and immigration fraud. The letter sets out a history of fraudulent activity in Europe from 2000. In 2007 he returned to Romania to carry on the fraud. There was a dispute between him and his criminal bosses and he was beaten and threatened. He fled to Mexico and entered the US illegally. In 2011 he contacted the FBI and began to provide valuable assistance to the agency which contributed to successful prosecutions. On 15 January 2020 the judge ordered the appellant to "conduct imminent self-deportation". He left the US and was arrested entering the UK.

Decision of the District Judge

22. The appellant submitted his proof of evidence and gave evidence before the judge. The judge found him to be incapable of belief on a number of matters. He described him as being "a thoroughly dishonest witness". The judge formed a very unfavourable view of the appellant and did not believe much, if any, of the evidence he gave. In a witness statement provided for the proceedings in the magistrates' court the appellant stated that he had no knowledge of any proceedings against him in Romania until after their conclusion. He had never instructed any lawyer to deal with the case in Romania. When he did hear about the conviction, he instructed Mr Nitu but was told that it was too late, and his appeal was out of time.

23. On the issue of his representation before the court in Bucharest it is hardly surprising that the judge did not accept his evidence. The EAW showed that Mr Marian Lungu had given an account of being instructed, of conversations between them in which they had discussed the proceedings, either by phone or WhatsApp and had made it clear to the court that he was "employed" by the appellant and was instructed to act. It had not been possible to provide documentary proof of that in a signed notarial authority to that effect, but the position was clear.

24. He denied that he was aware of the proceedings or that he had ever instructed a lawyer. He considered the suggestion that his father might have instructed a lawyer on his behalf but went on to say that his father was insane.

25. The judge found that he was aware of the proceedings. The judge found that he was deliberately absent. The judge concluded that the appellant was a 'fugitive' and could therefore not rely on the passage of time as a bar to his extradition.

26. The judge also found the evidence, as it then stood, from Mr Nitu to be "little more than speculation and assertions". At that stage Mr Nitu's evidence was largely confined to a commentary on the pre-conviction proceedings.

Application to adduce fresh evidence of Mihail-Iulian Nitu

27. Mr Nitu has provided a new statement dated 23 June 2021. He is a lawyer of more than 20 years' experience, he represented the appellant in his attempt to appeal the conviction in Romania. As in the evidence he gave to the magistrates' court, he provides a great deal of commentary on the proceedings in the lower court in Romania. He complains that the appellant was never summoned to appear before the court. He describes the representation by the court appointed lawyer as "superficial". He accepts that there was a "so-called chosen lawyer" but comments that the chosen lawyer did not provide a copy of his "mandate" to the court. He further criticises the process on the grounds of delay and describes the suspension of the process as an abuse to avoid the impact of the statute of limitations.

28. He is critical of the fact that it was not possible for the appellant to appear remotely, as he requested. He relates the appellant's account that he did not hear about the trial until he saw it on the internet and by then he was too late to lodge an appeal. In particular, he raises the issue of service at an address in Giurgiu, notwithstanding that the court knew the appellant was resident in the US at the time.

29. I have considered that material de bene esse, as it was agreed I should. The test of admissibility is set out in ***Hungary v Fenyvesi [2009] EWHC 231.***

30. As a commentary on the proceedings at first instance it does not add any value, it is purely comment. On the issue of the time limit on bringing the appeal I am not assisted as this expert opinion does not provide anything above and beyond the material set out in the answers given by the judge in response to the requests for further information.

31. This material would not satisfy the test in *Fenyvesi* in that it would not be decisive, and I do not admit it.

Law s20 Extradition Act 2003-Framework Decision-Cretu

32. The ground of appeal requires consideration of the interplay between s.20 of the 2003 Act and Article 4a of the 2002 Framework Decision 2002/584/JHA of 13 June 2002 introduced by way of amendment by Council Framework Decision 2009/299/JHA ("the 2009 Framework Decision").

33. The statutory protection for requested persons who have been convicted is found in s.20 of the Act, which provides a series of questions to be considered by the court,

> (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) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
>
> (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 not 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.

34. The principle is clear that a person has a right to attend his trial. That right is not absolute. The "objectives and scope" state that,

> "1. The objectives of this Framework Decision are to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial co-operation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between member states."

35. The Framework Decision goes on to state,

> "that under certain conditions the accused person may, of his or her own free will, expressly or tacitly but unequivocally, waive that right". Article 8 sets out that the accused person must know of the trial to be able, knowingly, to waive his right to attend."

36. Article 4a(1) says,

> "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) ……
>
> b) being aware of the schedule 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:"

37. In this case the appellant was undoubtedly not convicted in his presence. Therefore, the following questions arise,

    i) Was he deliberately absent from his trial?

    ii) Was he represented by a mandated lawyer in the proceedings, so as to amount to deemed presence?

    iii) If his absence was not deliberate, was he entitled to "a retrial or (on appeal) to a review amounting to a retrial"?

38. The leading authority in this area is ***Cretu v Romania [2016] EWHC 353 (Admin)*** in which Burnett LJ (as he then was) gives guidance on the interplay between s20 of the 2003 Act and the Framework Decision as amended.

39. The principles are clear, States must accord mutual respect and trust, extradition is the default position, Article 4 sets out reasons why a court **may** refuse to grant a request for extradition but does not prevent such a grant. At [34] Burnett LJ sets out how Article 4a should be interpreted, in particular and of direct relevance to this case at (iii) and (iv), but for completeness

> *"(i) "Trial" in section 20(3) of the 2003 Act must be read as meaning "trial which resulted in the decision" in conformity with article 4a(1)(a)(i). That suggests an event with a "scheduled date and place" and is not referring to a general prosecution process, Mitting J was right to foreshadow this in Bicioc's case.*
>
> *(ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(1)(a)(i) in a manner which, even though he may have been unaware of the scheduled date and place, does not violate article 6 of the Convention.*
>
> *(iii) An accused who has instructed ("mandated") a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it.*

> *(iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5), is to be determined by reference to article 4a(1)(d).*
>
> *(v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW."*

40. In ***Domi v Italy [2021] EWHC 923 (Admin)*** the Divisional Court emphatically reaffirmed that it is not for a court considering a request to "go behind" the words in the EAW.

41. There are many authorities which reiterate the principle that an accused person is entitled to be present at his trial, or if not, to be effectively represented, see ***Zana v Turkey [1997] 11 WLUK 419, Tolmachev v Estonia [2015] ECHR 659.*** Further that any waiver of a Convention right must be clear, unequivocal and done in reasonable foresight of the consequences.

42. Those principles are not in issue, the questions in this case are, firstly, was the appellant effectively represented in the proceedings and therefore deemed to be present? Secondly, did his request to appear remotely bring that deemed presence to an end? Thirdly, did he have the right to a re-trial?

Appellant's Submissions on Appeal

43. Mr. Swain submits that the judge was wrong to find that the appellant was a fugitive. He argues that the appellant was not represented by a lawyer of his choice and therefore should not have been deemed to be present by virtue of that representation. Further he submits that there was no effective service of the minutes of the hearing, as they were served at an address in Romania even though the authorities knew he was in the USA. By the time an application for a re-trial was lodged it was out of time and therefore the appellant did not have a right to a re-trial.

Grounds of Resistance

44. Mr. Ball accepts that the finding of the appellant as a fugitive is not correct but describes that as a "distraction" from the real point at issue in the appeal. He relies upon the EAW and further information provided to show that the appellant was represented by a lawyer that he had chosen to appear for him in the proceedings. That contention is clearly made out on the written material and the judge's findings having heard the appellant on this are unimpeachable. He submits that there is nothing between the parties on the law and this court should not go behind the findings of fact in the court below. He relies on the material from the court in Romania as demonstrating that the appellant, through his lawyer, was engaged and involved in the proceedings and that, given his failure to provide a current address, the court there could do no more than effect service on the last known address.

Discussion

45. I accept Mr. Swain's submissions that the judge was wrong to find that the appellant was a fugitive. He had left Romania before the proceedings commenced and he could not leave the USA to attend the hearings in Romania. However, as Mr. Ball argues, that is not the issue in this appeal.

46. Turning to the three questions of fact which this appeal requires to be answered. Firstly, was the accused effectively represented in the proceedings? Secondly, did the request to be heard by video link bring any effective representation to an end? Thirdly, if he was absent from his trial, did he have a right of appeal?

47. Was he deliberately absent from the trial by virtue of his having left Romania or did his detention in the USA mean he had not unequivocally waived his right to attend? Is his not being actually present remedied by his representation? The EAW makes clear that the appellant was aware of the trial and that he had instructed a lawyer to represent him, in addition to the presence of lawyer appointed by the court. I have no difficulty in concluding that he was represented by a lawyer to whom he had given instructions and with whom he was in regular contact. He was correctly deemed to be present. He was actively engaged in the proceedings, he asked to attend by video-link. The mandated lawyer was not able to produce documentary proof of his being instructed but that does not alter the fact that he was actually instructed, he had received instructions and was being paid to represent the appellant in the case.

48. The request made by the appellant to be allowed to attend by link from the USA could not be met by virtue of the limitations on the availability of such technology in Romania at that time. Whilst it might have been better if he could have participated in that way, he was nonetheless, under domestic law present by virtue of his representation. That his representation was effective is underpinned by the continuing contact between him and his lawyer during the proceedings, in addition he spoke directly to an attorney in the USA about his wish to follow the simplified proceedings, in other words admit the offences.

49. On the question of his right to a re-trial. As the court in *Cretu* made clear at [42], *"It can be assured that Romanian law will provide the right to a re-trial in appropriate cases".* The appellant did have a right to a re-trial, he did not exercise that undoubted right in time. He says it is because service was at an address at which he was not living. He knew, as did his lawyer, that he had not provided the court with a current address. As can be seen from the further information the court in Romania carefully considered the question of service as neither the appellant nor his lawyer had provided the court with an address in the USA. The only address available to the court was the one which the appellant himself had provided previously. The appellant was aware that he had not given an address in the USA and must have known that his address in Giurgiu was the only one on the court record. I am equally content that his mandated lawyer is deemed to know the rules about service. The EAW states that both the court appointed and personally chosen lawyers were present at the hearing.

50. During the course of the proceedings the appellant did what he could to be involved. He could not be physically present, so he instructed and paid for a lawyer to represent him. He enquired about the extent of the "losses" covered by the proceedings and whether all the losses in Romania would be included. He discussed the application of

the "simplified proceedings" but at that stage gave instructions that he was not guilty. He engaged with a lawyer in the USA, who happened to be a Romanian citizen. He discussed with her his wish to follow the simplified proceedings at that time, and she provided information to the court in Romania about his position in the USA. He failed either directly or indirectly to provide an address in the USA for service knowing that he had previously given the court the address in Giurgiu.

Conclusion

51. Although the judge was incorrect to decide that the appellant was a fugitive, his findings about his representation and indirect participation in the trial cannot be faulted. I accept Mr. Ball's description of the finding of fugitive status as a distraction and put that to one side. It does not impinge on the judge's findings about the course of the proceedings and the appellant's representation.

52. He found that the appellant was aware of the proceedings and was engaged in them. He was represented by a lawyer of his choice. His involvement is demonstrated by his request to attend remotely. That was not granted but that does not alter his deemed presence by his continuing representation. He did not provide an address for service in the USA, accordingly the court could only use the address he had previously given. He had a right to a re-trial which had to be exercised within a short period, he did not take up that right because he had avoided being served by failing to give a current address.

53. The decision of the judge was correct and therefore he ought not to have decided the case differently. This appeal is dismissed.