Press Summary

6 March 2024

Merticariu (Appellant) *v* Judecatoria Arad, Romania (Respondent)

[2024] UKSC 10

On appeal from [2022] EWHC 1507 (Admin)

Justices: Lord Hodge (Deputy President), Lord Sales, Lord Burrows, Lord Stephens, Lord Burnett

Background to the Appeal

The appellant was arrested in England on 25 September 2019 pursuant to a European Arrest Warrant ("EAW") issued by the respondent ("the requesting judicial authority"). The EAW was issued on the basis of a sentence imposed on the appellant by a Romanian court on 11 April 2019 for burglary. The question of whether to extradite the appellant pursuant to the EAW was determined by a district judge by reference to the questions set out in section 20 of the Extradition Act 2003 (the "Act") read in conformity with the 2002 Council Framework Decision 2002/584/JHA of 13 June 2002, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (the "Amended Framework Decision"). The district judge found that the appellant had not been present at trial and had not deliberately absented himself from trial.

The district judge was therefore required by section 20(5) of the Act to ask whether the appellant "*would be entitled to a retrial or (on appeal) to a review amounting to a retrial*" on return to Romania. The district judge concluded that the appellant had a right to a retrial in Romania even though he was required to make an application for a retrial in Romania and the success of that application was contingent on the appellant demonstrating that he had not deliberately absented himself from trial. The district judge therefore ordered the appellant's extradition.

The High Court dismissed the appellant's appeal but certified the following points as points of law of general public importance for the Supreme Court to determine: "In a case where the appropriate judge has decided the questions in section 20(1) and (3) of the Extradition Act 2003 in the negative, can the appropriate judge answer the question in section 20(5) in the affirmative if (a) the law of the requesting state confers a right to retrial which depends on a finding by a judicial authority of that state as to whether the requested person was deliberately absent from his trial; and (b) it is

not possible to say that a finding of deliberate absence is 'theoretical' or 'so remote that it can be discounted'? If so, in what circumstances?" The Supreme Court granted permission for the appellant to appeal on these points of law.

Judgment

The Supreme Court unanimously allows the appeal. It holds that to establish that a requested person would be entitled to a retrial or (on appeal) to a review amounting to a retrial on return to the requesting state the entitlement must not be dependent on any contingency, except for purely procedural matters such as making an application in the manner and in the time prescribed in the requesting state. Lord Stephens and Lord Burnett give the lead judgment, with which Lord Hodge, Lord Sales and Lord Burrows agree.

Reasons for the Judgment

The short point in this appeal concerns the proper construction of section 20(5) of the Act.

The Supreme Court holds that the natural and ordinary meaning of the words in section 20(5) of the Act are plain **[51]**. The judge must decide whether the requested person is "*entitled*" to a retrial or (on appeal) to a review amounting to a retrial. Section 20(5) does not require the judge to decide a different question, namely whether the requested person is "*entitled to apply for a retrial*" **[51]**. An entitlement to a retrial cannot be contingent on the court in the requesting state making a factual finding that the requested person was not present at or was not deliberately absent from their trial **[51]**.

The Supreme Court considers that a requested person may have the right to a retrial even if the domestic law of the requesting state requires him to take "procedural steps" to invoke the right **[52]**. But if the entitlement to a retrial is contingent on a finding that the requested person was not deliberately absent from his trial, the proceedings leading to that finding would not naturally be referred to as a "procedural step". Rather, those proceedings in the requesting state should be regarded as involving a decision on a substantive issue **[52]**. The Supreme Court's interpretation of section 20(5) of the Act is supported by the wording in article 4a(1) of the Amended Framework Decision which replaced the phrase "an *opportunity* to apply for retrial" in the 2002 Council Framework with the phrase "right to a retrial" **[53]**. It is also consistent with the scope of the right to be present at trial under article 6 of the Convention as interpreted by the European Court of Human Rights **[54]**.

The Supreme Court holds that the appropriate judge cannot answer section 20(5) of the 2003 Act in the affirmative if the law of the requesting state confers a right to retrial which depends on a finding by a judicial authority in the requesting state as to whether the requested person was deliberately absent from his trial **[63]**. In this case, neither the EAW nor the further information provided by the requesting judicial authority confirmed that the appellant was entitled to a retrial **[65]**. The district judge in this case should therefore have answered section 20(5) in the negative. Accordingly, the Supreme Court quashes the district judge's order and orders the appellant's discharge **[68]**.

References in square brackets are to paragraphs in the judgment.

NOTE:
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: Decided cases - The Supreme Court