Status: Positive or Neutral Judicial Treatment

Mugurel Cretu v Local Court of Suceava, Romania

Case No: CO/4514/2015

High Court of Justice Queen's Bench Division Divisional Court

26 February 2016

[2016] EWHC 353 (Admin)

2016 WL 00692448

Before: The Rt Hon Lord Justice Burnett The Hon Mr Justice Irwin

Date: 26/02/2016

Hearing date: 19 January 2016

Representation

John Jones QC and Myles Grandison (instructed by Lansbury Worthington) for the Appellant.

Julian Knowles QC and Julia Farrant (instructed by CPS Extradition Unit) for the Respondent.

Judgment

Lord Justice Burnett:

1 On 16 September 2015 the appellant's extradition to Romania was ordered by District Judge Goldspring sitting at Westminster Magistrates' Court pursuant to a European Arrest Warrant ("EAW") issued on 10 December 2014 and certified by the National Crime Agency on the following day. The appellant has been given permission to appeal on three grounds:

i) The judge erred in finding that the appellant had absented himself deliberately from his trial for the purposes of Section 20 of the Extradition Act 2003 ["the 2003 Act"];

ii) The judge erred in concluding that it would not be unjust or oppressive to order the extradition of the appellant on account of his mental condition, applying Section 25 of the 2003 Act;

iii) The judge erred in concluding that the extradition request was not an abuse of process.

2 The first ground concerns the circumstances in which the appellant was convicted of aggravated burglary in Suceava, Romania in November 2010 and sentenced to a term of imprisonment of five years and ten months. A subsidiary question arises whether he would be entitled to a retrial following surrender to Romania. In view of this primary conclusion, the district

Judge did not have to decide that question. The respondent's case is that even if the appellant did not deliberately absent himself from his trial, he is entitled to a retrial. Both aspects of this ground require consideration of Section 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"]. The second ground arises because the appellant is at risk of committing suicide. The third ground flows from a contention that the sentence identified in the warrant is demonstrably wrong. The sentence imposed, it is said, is one of three years and the balance is made up of what would be described in this jurisdiction as activated suspended sentences.

The EAW

3 The EAW was the third by which the Romanian authorities had sought the extradition of the appellant. It was in the form prescribed by the 2009 Framework Decision which, to reflect article 4a , introduced a change into the form hitherto used. We have a copy of the original Romanian version and a translation into English. The EAW is available in English in the Framework Decisions, but rather than using that English version as the basis of translation and inserting any additional text, it appears to have been translated from scratch. That has resulted in some clunky language. The second EAW was also in the form prescribed by the Framework Decisions. That EAW was technically deficient. So too was the first, which was in the form prescribed by the 2002 Framework Decision before amendment. That too failed for technical reasons.

4 The EAW indicates that the appellant is sought to serve a sentence imposed at first instance on 10 November 2010 and finally confirmed on appeal on 1 February 2011. The EAW identifies the length of the sentence as 5 years and 10 months, all of which is unserved. The offence had occurred on the night of 14/15 November 2006. The section of the EAW which was changed by the 2009 Framework Decision is part (d). Its purpose is to provide information relating to absence from trial and the possibility of retrial which is necessary to determine whether the executing judicial authority has the power to refuse to execute the warrant. It closely follows the language of the new article 4a . In this case it states:

> **"(d) Decision rendered in the absentia and:**
>
> 1. # The person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia.
>
> 2. No, the person was not in person at the hearing which led to the decision.
>
> 3. If you have marked point 2, please confirm the existence of one of the following elements.
>
> 3.1a the person was legally summoned on May 27th 2009; June 24th 2009; September 2nd 2009, October 7th 2099, November 18th 2009, January 13th 2010, February 24th 2010, March 24th 2010, May 5th 2010, May 26th 2010, June 23rd 2010, September 15th 2010, October 20th 2010, November 3rd 2010 and therefore was informed about the date and place settled for the trial whose decision was issued and was informed that a verdict can be issued even if he doesn't come to the trial;
>
> Or
>
> 3.1b # the person was not personally summoned, but has effectively received by other communication means of an official notification regarding the date and place settled for the trial whose decision was issued so at it was ascertained without any doubt that the person knew about the settled trial and she was informed about the fact that a decision could be issued if he doesn't come to trial;
>
> Or
>
> 3.2 being informed about the settled trial, he authorized a defender who was appointed either by himself or*ex officio* in order to defend him during the trial and indeed he was defended by that lawyer at the trial.

3.3 # the person was given the decision personally and he was expressly informed about his right for re-judging the case or choosing a means of appeal and for this he has the right to come and let the case, including the new proofs, being re-examined and this may have as consequence the annulment of the previous decision; and the person expressly declared that he would not contest this decision:

Or

the person did not asked either the case re-judgment or the promotion of a means of appeal in a due time.

3.4 the person was not given the decision personally but:

– the decision will be given to him personally as soon as possible after delivery; and

– at the moment when the person will be given the decision, this person will be expressly informed about the right of case re-judgment or a means of appeal that he has the right to, where he could attend personally and that means the whole case, including the new proofs, to be re-examined and this could lead to the annulment of the previous decision; and

– the person will be informed about the time interval in which he may ask the case re-judgment or the promotion of a means of appeal, that is 10 days.

4. If you have marked point 3.1b, 3.2, or 3.3 please provide information regarding the modality in which the relevant condition was fulfilled:

– he benefited of an ex officio defender."

5 The English form of point 3.1a in the 2009 Framework Decision starts "the person was summoned in person on …". 3.2 starts "being aware of the scheduled trial, the person had given a mandate to a legal counsellor …" Point 3.4, in the official English version provides:

"the person was not personally served with the decision, but

– the person will be personally served with the decision without delay after the surrender, and

– when served with the decision, the person will be expressly informed of his or her right to a retrial or appeal, in which he or she 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

– the person will be informed of the time frame within which he or she has to request a retrial or appeal, which will be … days. "

There is no reason to suppose that the Romanian version of the EAW did not faithfully follow the language of the Framework Decisions and thus reflect the authorised English version.

6 The EAW thus confirms that the appellant was not present at the hearing which led to the decision to impose the sentence of 5 years and 10 months, but that he was repeatedly summoned to successive court hearings. The last summons referred to was on 3 November 2010, which was shortly before the decision was made. The combination of answers at points 3.2 and 4 show that the appellant was represented by a lawyer "ex officio". When one considers the authorised English text in the 2009 Framework Decision , it is clear that point 3.2 is concerned to treat an absent defendant who instructed a lawyer to appear on his behalf, as being present. It is also clear that the judge who filled in or approved the EAW, in putting a cross against 3.2, was

doing no more than providing information that the appellant was represented, but (in the language of article 4a) had not given a mandate to the lawyer concerned. Other material provided by the Romanian judicial authority, and a different lawyer who has reviewed the court file, demonstrates that the lawyer acted without instructions both at the trial and in pursuing an appeal. The lawyer was appointed by the court to protect the appellant's interests as best she could. The answer at 3.4 suggests that the appellant will be given the decision on his return to Romania, informed of his right to a retrial and the period (10 days) within which he must apply for that retrial.

Statutory Provisions

7 Section 20 of the 2003 Act provides:

> **"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) 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."

Section 25 provides:

> **"Physical or mental condition**
>
> (1) This section applies if at any time in the extradition hearing it appears to the judge

that the condition in subsection (2) is satisfied.

(2) The condition is that the physical or mental condition of the person in respect of whom the Part 1 warrant is issued is such that it would be unjust or oppressive to extradite him.

(3) The judge must –

(a) Order the person's discharge, or

(b) Adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied."

8 The district judge concluded that the appellant had not been convicted in his presence but that he had deliberately absented himself from his trial. Applying *Mitoi v Government of Romania [2006] EWHC 1977 (Admin)* , he required the judicial authority to prove to the criminal standard that he had deliberately absented himself. He relied upon evidence from the judicial authority that the appellant had been "heard as a criminal accused" on 20 February 2007 in connection with the offence, which he admitted. As is not uncommon in civilian jurisdictions, that was not a hearing before a judge. The appellant was not detained in custody for this offence. He had been in custody for other offences. Following his formal interview he was released under an obligation to inform the police of any change of address within three days of a move, but was not on bail. He was not prohibited from leaving Romania and says he travelled to Italy in March 2007 and then to the United Kingdom seven months later. He provided no new address to the Romanian police. The summonses were sent to two addresses he had given. He attended none of the court hearings in Romania. In November 2010 the court was told that he could not be found. That was why the trial came to a conclusion in his absence. The district judge was of the view that having given an address to which any court process would be sent, and having failed (as he was obliged to do) to provide a change of address, the appellant "deliberately absented himself from his trial". In coming to that conclusion the district judge applied the decision of this court in *Podlas v Koszalin District Court, Poland [2015] EWHC 908 (Admin)* .

9 The district judge concluded that the trial process had started when the appellant was released on 20 February 2007 although, with respect, that is not supported by the information from the judicial authority. Although (once more) the translation of the document in question is woeful, a letter of 19 March 2015 shows that the appellant was heard on 20 February "before the beginning of the criminal action" but he was "officially impeached" on 31 March 2009. That ties in with the date of the first summons for him to attend court, which the EAW shows was issued on 27 May 2009. The letter explains that the appellant was not informed of the decision that he had been "impeached", which I take to be that he was being prosecuted, because "he had not been found at the known addresses". The position is that he was notified of the proceedings at the address he had provided to the police, but may not have been aware of them. The statement provided by the appellant for the purposes of the extradition hearing is silent about whether he was, or was not, aware of the summonses.

10 In his ruling, the district judge found that the appellant had been obliged to tell the court of any move. The evidence in fact shows that his obligation was to tell the police.

11 The district judge had before him both written and oral psychiatric evidence which described the appellant's condition. Applying the approach approved by this court in *Wolkowicz v Poland [2013] EWHC 102 (Admin)* he concluded that it would not be unjust or oppressive to surrender the appellant to Romania. He was unimpressed by the abuse argument.

The 2009 Framework Decision and its Status

12 Articles 1 and 2 of the 2009 Framework Decision provide:

‘Article 1

Objectives and scope

1. The objectives of this Framework Decision are to enhance the procedural rights of persons subject to criminal proceedings, to facilitate judicial cooperation in criminal matters and, in particular, to improve mutual recognition of judicial decisions between Member States.

Article 2

Amendments to Framework Decision (2002/584/JHA)

Framework Decision (2002/584/JHA) is hereby amended as follows:

1. The following Article shall be inserted:

“Article 4a

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 scheduled 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, and 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.

2. In case the European arrest warrant is issued for the purpose of executing a custodial sentence or detention order under the conditions of paragraph 1(d) and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, he or she may, when being informed about the content of the European arrest warrant, request to receive a copy of the judgment before being surrendered. Immediately after having been informed about the request, the issuing authority shall provide the copy of the judgment via the executing authority to the person sought. The request of the person sought shall neither delay the surrender procedure nor delay the decision to execute the European arrest warrant. The provision of the judgment to the person concerned is for information purposes only; it shall neither be regarded as a formal service of the judgment nor actuate any time limits applicable for requesting a retrial or appeal.

3. In case a person is surrendered under the conditions of paragraph (1)(d) and he or she has requested a retrial or appeal, the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention. The retrial or appeal shall begin within due time after the surrender.';

2. …

3. In the annex (EUROPEAN ARREST WARRANT), point (d) shall be replaced by the following:"

The amendments to the *pro forma* European arrest warrant to which I have referred were then set out.

13 In Podlas at para 23, this court decided that section 20(3) of the 2003 Act could not be construed in the light of the 2009 Framework Decision because the 2003 Act was passed long before and article 4a had never been given the force of law in the United Kingdom. Mr John Jones QC, for the appellant, submits that in that respect Podlas was wrongly decided. Mr Knowles QC, for the judicial authority, agrees. Respectfully, I too would agree.

14 There had been a change in the status of the 2009 Framework Decision from 1 December 2014. Two events came together. First, the Lisbon Treaty merged what were known as the First and Third Pillars (relating respectively to the Internal Market, and Police and Judicial Cooperation

in Criminal Matters) into one mechanism. The Framework Decisions were Third Pillar instruments. Prior to the Treaty of Lisbon , by virtue of article 35 of the Treaty on European Union the Luxembourg Court had no jurisdiction to make preliminary rulings in respect of such instruments, unless a Member State expressly accepted jurisdiction. The United Kingdom did not do so. By virtue of the 2009 Treaty of Lisbon such instruments acquired the status of First Pillar instruments after the expiry of a five year transitional period. Thus it was envisaged that from 1 December 2014 the Commission would gain power to bring infringement proceedings in respect of, and the Luxembourg Court power to give binding judgments on the interpretation of, pre-Lisbon Third Pillar instruments, including the two Framework Decisions. Pre-Lisbon Framework Decisions are now accorded the status of post-Lisbon directives.

15 However, secondly, the United Kingdom had the right to opt out of all pre-Lisbon measures relating to Police and Judicial Cooperation in Criminal Matters from 1 December 2014. That was to enable it to choose which, if any, of those instruments should acquire the status of First Pillar instruments for the purpose of our domestic law. The United Kingdom exercised that right but opted back into 35 of them, including the two Framework Decisions, on 1 December 2014.

16 In *Assange v Swedish Prosecuting Authority [2012] 2 AC 471* , one of the many questions considered by the Supreme Court was whether the decision of the Luxembourg Court in *Criminal proceedings against Pupino (Case C-105/03) [2006] QB 83* required the domestic courts to give effect to the 2002 Framework Decision when interpreting the 2003 Act to the extent that it is possible to do so without contradicting the clear intent of the legislation. This is known as the principle of conforming interpretation. Pupino was a case which concerned a question relating to a different Third Pillar Framework Decision , which was referred to the Luxembourg Court from Italy. The strong Pupino interpretative obligation was contrasted in the Supreme Court with the weaker canon of statutory construction that Parliament does not intend to legislate contrary to the United Kingdom's international obligations. Lord Mance demonstrated that the Pupino approach did not apply because the Framework Decisions did not fall within the scope of the European Communities Act 1972 . That had become common ground in the course of the proceedings before the Supreme Court: Lady Hale at [175]. Lord Mance's analysis begins at [198]. At [217] he concluded:

> “The Framework Decision, the Court of Justice's decision in Pupino and the European legal principle of conforming interpretation are not therefore part of United Kingdom law under the 1972 Act. The only domestically relevant legal principle is the common law presumption that the Extradition Act was intended to be read consistently with the United Kingdom's international obligations under the framework decision on the European arrest warrant. But this presumption is subject always to the will of Parliament as expressed in the language of the Act read in the light of such other interpretative canons and material as may be relevant and admissible.”

17 The short point, which is common ground before us, is that because of the changes which came about on 1 December 2014, the Framework Decisions now fall within the scope of the European Communities Act 1972 . That is because of the change of their status effected by the Lisbon Treaty and because the United Kingdom has opted back into both Framework Decisions. The domestic courts are obliged to interpret domestic law consistently with EU law which applies to the United Kingdom, including by applying the principle of conforming interpretation. So much was flagged up by Lord Mance at [200] when he indicated:

> “Failing their repeal, annulment or amendment, the position in respect of Title VI measures remaining in force unamended at the end of the five year period is that the United Kingdom has, under article 10(3) and 10(5) of Protocol No 36, an option to notify a blanket opt-out as from 1 December 2014 with an accompanying right to apply to opt back in selectively to individual measures. If the United Kingdom decides not to notify a blanket opt-out or if, having notified one, it applied successfully to opt back in to the Framework decision of the European arrest warrant, it must accept the jurisdiction of the Court of Justice and the Commission's right of enforcement.”

18 Assange is not mentioned in the judgment of the court in Podlas and does not appear to have

been referred to in argument. The significance of the changes effected to the status of the Framework Decisions on 1 December 2014 was not considered. On this point, I conclude respectfully that the decision was *per incuriam* . The conforming interpretation principle of Pupino now applies to the 2003 Act, including the provisions introduced by way of amendment in 2014.

19 The parties developed submissions before us on the meaning of “deliberately absented himself from his trial” in section 20(3) by reference to article 4a . In Podlas Aikens LJ, giving the judgment of the court, reviewed the domestic authorities, in particular *Government of Albania v Bleta [2005] 1 WLR 3576* , *Atkinson & Binnington v Supreme Court of Cyprus [2010] 1 WLR 570* , *Zwolak v District Court of Legnica Poland [2013] EWHC 1812 (Admin)* and *Bicioc v Baia Mare Local Court Romania [2014] EWHC 628 (Admin)* . The court's conclusion on the correct approach, was set out at [23]:

> “First, section 20(3) cannot be construed in the light of FD 2009, … Secondly, it is clearly established by Calderelli and Atkinson & Bennington that what constitutes “the trial” for the purposes of section 20(3) is a question of fact and that in many Member States, “the trial” is a process, not just a single hearing. We think we must follow that approach. Thirdly, however, we accept that, upon its correct construction, section 20(3) can only become relevant when, in accordance with the procedures of the relevant requesting state, a “trial process” has been initiated against the requested person. Whether this “trial process” has been initiated will be a question of fact in each case. Fourthly, given the terms of section 206 of the EA , it must be for the JA to prove to the criminal standard, that the requested person has absented himself from this “trial process” and that he has done so deliberately. *How* the requested person knows of the process is irrelevant; it is the fact of his knowledge of the process that counts. Fifthly, whether a requested person has absented himself from the trial process “deliberately” calls for a consideration of what is in the mind of that person: see Atkinson & Binnington at [40] per Maurice Kay LJ. A requested person cannot have “deliberately” absented himself from a “trial process” if he did not know that that process is taking place or is about to be started. Sixthly, we agree with Mitting J that proof of the fact that the requested person had taken steps which made it difficult or impossible for the prosecuting authorities of the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial or, we would add, the start of the “trial process”, is not of itself proof that the requested person has “deliberately absented himself from his trial” for the purposes of section 20(3) .”

Argument and discussion on section 20(3)

20 On behalf of the appellant, Mr Jones accepts that the fifth and sixth propositions from Podlas are not affected by article 4a . He also accepts in accordance with the fourth proposition that the requesting judicial authority must prove that an accused deliberately absented himself from his trial, but submits how he gained knowledge is relevant because article 4a.1(a)(i) identifies only two relevant mechanisms. He submits that the second and third propositions require reconsideration. That is because article 4a is concerned with the concept of a “trial resulting in the decision” on a “scheduled date” which focusses on the date on which a person was convicted and then sentenced. The concept of a trial process is too vague. He points to the analysis of article 4a of Mitting J in Bicioc which Aikens LJ indicated “may well be correct”. Mitting J considered that article 4a “fits far more closely with the reasoning in Bleta than it does with the reasoning in [Atkinson or Zwolak].”

21 Bleta was an early case dealing with section 85(3) of the 2003 Act which is in the same terms as section 20(3) but applies to Part 2 countries. At [48] Pill LJ said:

> “I reach the following conclusions:
>
> (a) In Section 85(3) Parliament has adopted the expression “deliberately absented himself from his trial”. Consideration must be given to the concept of deliberate absence and to the concept of a trial. The Respondent has deliberately absented himself from Albania but there is no evidence that he knew of the existence of a trial or of any

proceedings which might lead to a trial.

(b) The word “trial” was adopted by Parliament in the context of the presence of Article 6 with its use of the word “hearing” and its reference to a right to a hearing and a right to be informed of the nature and cause of the accusation. Article 6 confers the right to a fair trial and the word “trial” would not have been used by Parliament in Section 85(3) if a wider view of absence had been intended.

(c) The sub-section must be construed in a context in which capital importance is attached to the appearance of a defendant at his trial. The focus is on a specific event at which the Respondent could expect to be present. Other factors, as well as the need to facilitate extradition, are at work.

(d) Parliament could have used an expression such as “deliberately absenting himself from legal process” which could, on appropriate findings of fact, include leaving a jurisdiction to avoid arrest but Parliament has not done so and the sub-section cannot be construed as if it had. The expression “his trial” contemplates a specific event and not the entire legal process.

(e) In the result, I am unable to construe the words of Section 85(3) as covering the present circumstances. While the absence from the jurisdiction of Albania is established, it is not established that the Respondent left that jurisdiction, or remained in the United Kingdom, with the intention expressed in the sub-section.”

22 Mr Knowles submits that the cosmopolitan approach to the interpretation of words such as “trial” and “charge” in the 2003 Act, which is applied to domestic legislation to reflect the differences of practice and procedure in foreign jurisdictions, and which led this court in the cases subsequent to Bleta to depart from the narrow concept of the trial being an event, is not affected by article 4a . It too must reflect the reality that across the many jurisdictions within the European Union there is a range of procedures.

23 The structure of the 2002 Framework Decision establishes three different broad classes of case. First, cases where the state receiving a request to surrender must do so. That is the default position. Secondly, cases where it is mandatory to refuse to execute an EAW. Those are described in article 3 . Thirdly, cases where the state receiving the request may refuse to execute. Article 4 identifies various circumstances when that may happen. Article 4a provides an additional non mandatory ground to refuse to surrender, where a trial has taken place in the absence of the defendant unless one or more of the four circumstances are established. If they are not then the default position applies and surrender must follow. In short, paragraph 1 of article 4a allows, but does not require, the state in receipt of a request to refuse to surrender if the person did not appear at “the trial resulting in the decision” unless at least one of the four exceptions is established.

24 The first point to note is that paragraph 1 contemplates that the relevant exceptions will be established by statements in the EAW itself. It does not envisage a general evidential inquiry into the matters thereafter set out.

25 Exception (a) enables the judicial authority to state in the EAW that the requested person was summoned in person and thereby informed of the date and place of the trial which resulted in the decision. Alternatively, it may state he received the information by some other means. In either case it must confirm that he was told that the court may proceed in his absence. The amended *pro forma* covers those two alternatives in points 3.1a and 3.1b.

26 Exception (b) covers circumstances where the requested person instructed a lawyer to represent him in the trial; and exception (c) covers the situation where the requested person (whether represented or not) is informed of the judgment and the right to a re-trial, but does not avail himself of that option. Exception (d) is concerned with the right to a retrial.

27 In my view, the natural meaning of “scheduled date and place of the trial which resulted in the decision” and “scheduled date and place of that trial” suggests that it is referring to an event which resulted in the person's conviction and sentence, rather than a broad concept of a trial process. Indeed it is not possible to notify a “scheduled date and place” for a legal process. That interpretation is reinforced by recital (9) to the 2009 Framework Decision which states:

> "The scheduled date of a trial may for practical reasons initially be expressed as several possible dates within a short period of time."

28 Mr Jones submits that the two alternatives found in paragraph 1.(a)(i) of article 4a (summons or other official means of notification) both require the person concerned to have actual knowledge of the scheduled date. It matters not, for example, if a defendant in criminal proceedings were deliberately to contrive to avoid receiving notification of a trial date by moving during the course of the proceedings, whilst not telling the court. He submits that the first alternative contemplates personal service, as that concept would be understood in this jurisdiction, and is not concerned with posting or delivering a summons to an accused person's address.

29 To my mind, these submissions are not consistent with recitals (1) and (8) to the 2009 Framework Decision . Recital (1) refers to article 6 of the European Convention on Human Rights , including the right of an accused to appear at his trial, but notes that the Strasbourg Court has declared that right not to be absolute. The accused may "by his own free will, expressly or tacitly but unequivocally, waive that right." Recital (8) provides:

> "The right to a fair trial of an accused person is guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms , as interpreted by the European Court of Human Rights. This right includes the right of the person concerned to appear in person at the trial. In order to exercise this right, the person concerned needs to be aware of the scheduled trial. Under this Framework Decision, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of that Convention. In accordance with the case law of the European Court of Human Rights, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention could, where appropriate, also be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her."

30 Recital (7) provides in narrative form exactly the same description which emerges in paragraph 1(a)(i) of article 4a . These two recitals suggest that the phrase "summoned in person and thereby informed of the scheduled date" should be interpreted in accordance with the jurisprudence of the Strasbourg Court when it has considered cases where a trial proceeded in the absence of an accused who may not have been aware of the date of the trial but was himself responsible for his state of ignorance. Furthermore, the structure of 1.(a)(i) itself suggests a contrast between that first alternative and the second (other official information) which in terms requires it to be established unequivocally that the person was aware of the scheduled trial. If the Strasbourg Court would consider the summons sufficient to meet the requirements of article 6 , even if the accused did not in fact receive it, then in my opinion it would be sufficient to satisfy article 4a .

31 A leading decision of the Strasbourg Court on this topic is *Collozza and Rubinat v Italy (1985) 7 EHRR 516* which held that an accused had a right to be present and take part in criminal proceedings but that a trial *in absentia* could be acceptable if the state had diligently but unsuccessfully given the accused notice of the hearing. The Strasbourg Court applies a principle that depends upon "unequivocal waiver". The question whether to proceed with a trial in the absence of an accused in the court of a Convention state would involve an inquiry which was heavily fact specific. So too, would any subsequent complaint to the Strasbourg Court of a breach of article 6 .

32 However, in the context of a request to surrender a convicted person to a Part 1 country to serve a sentence, in my judgment no such inquiry is called for. The requesting judicial authority is expected to convey the relevant information in the EAW itself. If the information meets the requirements of article 4a that would provide the evidence upon which the executing Judicial authority would act. The trial has, of course, already taken place. The decision whether to proceed in the accused's absence has been made. It may have involved a conclusion that a trial

in absentia is compliant with article 6 or (as is the case in some jurisdictions) have proceeded in the full knowledge that if the accused were convicted but was later found, he would be entitled to a retrial. The Framework Decisions do not contemplate an investigation by the courts of one Member State into the circumstances in which a court of another Member State decided to proceed in the absence of an accused. Still less could it be consistent with the concept of mutual confidence that courts in one Member State should be making findings on past compliance with article 6 ECHR in the courts of the other Member States.

33 The United Kingdom was one of the co-sponsors of the 2009 Framework Decision . The view of the Government was that it was unnecessary to amend the 2003 Act to implement the 2009 Framework Decision because " section 20 deals with convictions in absence" – See "Decision pursuant to Article 10 of Protocol 36 to the Treaty on the Functioning of the European Union , July 2013" Cm 8671 at para 95.

34 In my judgment, when read in the light of article 4asection 20 of the 2003 Act, by applying a Pupino conforming interpretation, should be interpreted as follows:—

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 paragraph 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 .

ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a paragraph 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 ECHR ;

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 paragraph 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.

35 It will not be appropriate for requesting judicial authorities to be pressed for further information relating to the statements made in an EAW pursuant to article 4a save in cases of ambiguity, confusion or possibly in connection with an argument that the warrant is an abuse of process. The issue at the extradition hearing will be whether the EAW contains the necessary statement. Article 4a is drafted to require surrender if the European arrest warrant states that the person, in accordance with the procedural law of the issuing Member State, falls within one of the four exceptions. It does not contemplate that the executing state will conduct an independent investigation into those matters. That is not surprising. The EAW system is based on mutual trust and confidence. Article 1 of the 2009 Framework Decision indentifies improvement in mutual recognition of judicial decisions as one of its aims. It also contemplates surrender occurring very shortly after an EAW is issued and certified. To explore all the underlying facts would generate

extensive satellite litigation and be inconsistent with the scheme of the Framework Decision. Article 4a provides additional procedural safeguards for a requested person beyond the provision it replaced in the original version of the Framework Decision , but it does not call for one Member State in any given case to explore the minutiae of what has occurred in the requesting Member State or to receive evidence about whether the statement in the EAW is accurate. That is a process which might well entail a detailed examination of the conduct of the proceedings in that other state with a view to passing judgment on whether the foreign court had abided by its own domestic law, EU law and the ECHR . It might require the court in one state to rule on the meaning of the law in the other state. It would entail an examination of factual matters in this jurisdiction, on which the foreign court had already come to conclusions, but on partial or different evidence. None of that is consistent with article 4a of the Framework Decision .

36 Should a requested person be surrendered on what turns out to be a mistaken factual assertion contained in the EAW relating to article 4a , he will not be helpless. He would have the protections afforded by domestic, EU and ECHR law in that jurisdiction. Furthermore, article 4a does not require the executing judicial authority to refuse to surrender if the person did not appear at his trial, even if none of the exceptions applies. No doubt that is because it can assumed that whatever may be the circumstances of a requested person on his surrender, he will be treated in accordance with article 6 ECHR in an EU state.

37 In the event that the requesting judicial authority does provide further information I can see no reason why that information should not be taken into account in seeking to understand what has been stated in the EAW.

38 In this case, Mr Jones submits that the EAW is, at best, confusing because three boxes were ticked when the *pro forma* contemplates a series of four alternatives. To my mind, it does not follow from the structure of the EAW that the four alternatives are necessarily mutually exclusive. For example, an accused may be appropriately summoned (paragraph 1a), or otherwise be aware of the trial, and instruct a lawyer to attend and argue the case in his absence (paragraph 1b). Thereafter, he might be served with the decision and be informed of his right to appeal and not pursue it (paragraph1(c)). The question whether an accused is entitled to a retrial or appeal is answered very differently across the various jurisdictions of the European Union. It is at least conceivable that an accused properly summoned might nonetheless be entitled to a retrial.

39 The EAW in this case stated that the appellant was summoned in accordance with the first part of article 4a paragraph 1.(a)(i) . It amounts to a statement that he either knew of the relevant place and date or, if he did not, it was nonetheless fair to proceed with the trial. That is a judgement for the Romanian judicial authority. No doubt it calls for consideration of its domestic legal order, and in particular the status of the interview (or hearing as it was called), and the effect of requiring an accused who has admitted an offence, as this appellant did, to ensure that the authorities were informed of his current whereabouts. In a later communication, the judicial authority accepted that the appellant may not in fact have known of the scheduled date of the trial but, for the reasons I have given, that does not fatally undermine the statement made in this part of the EAW, because actual knowledge is not a requirement for the first part of paragraph 1.(a)(i).

40 The district judge applied the law as he understood it to be, relying upon Podlas . That was entirely understandable but does not reflect the appropriate legal approach. Mr Jones is critical of the district judge's factual conclusions about the circumstances of what had occurred in February 2007; and of the appellant's obligations regarding notification of his change of address, as indicated in paragraph [9] and [10] above. That said, the question is whether the EAW “states that the person, in accordance with the requirements defined [in Romanian law].. was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision”. The EAW makes the required statement. The subsequent information includes a further explanation that the appellant may not in fact have known of the date. But it is sufficient if he is summoned in circumstances that would allow the trial to proceed and in circumstances that would not violate article 6 ECHR . Reading the statement in point 3.1a in the light of the further information provided, that is its effect. Article 4a of the Framework Decision requires that statement to be taken at face value. For the purposes of section 20(3) the district judge would have been obliged to conclude that the appellant deliberately absented himself from his trial.

41 The judicial authority has additionally stated, by virtue of having ticked point 3.4 on the EAW that, so long as he applies within 10 days of his surrender, the appellant will have a right to a re-hearing. In my judgment Mr Knowles was correct to submit that, even if the district judge was

wrong under section 20(3) of the 2003 Act, he would have been obliged to conclude that the appellant would be entitled to a retrial for the purposes of section 20(5) . The Romanian retrial provisions are found in articles 466 to 469 of the Romanian Code of Criminal Procedure 2010 , which were amended in 2014. In this regard, Mr Jones developed an argument on the wording of article 466 of the Code. It mirrored an argument advanced in BP v High Court, Maramures, Romania [2015] EWHC 3417 to the effect that given the appellant's circumstances, he would not be regarded as having been tried *in absentia* and so would not have a right to a retrial; or in the language of section 20(5) of the 2003 Act would not have an "entitlement".

42 This submission illustrates the type of dispute which article 4a of the Framework Decision is crafted to avoid, by requiring the condition which removes the discretion to refuse to execute the EAW, to be judged by reference to a statement in the EAW. We are being asked to determine the meaning and effect of a piece of Romanian legislation (which in English law is a question of fact rather than law) by reference to little more than its language alone, in a way which contradicts the statement in the EAW. Once again, in my judgment, the statement in the EAW must be taken at face value and is sufficient to satisfy the requirements of both article 4a and section 20(5) . That said, it is common ground that article 466 was introduced by way of amendment to transpose into Romanian law the relevant parts of article 4a of the Framework Decision . It can be assumed that Romanian law will provide the right to a retrial in appropriate cases.

43 The EAW in this case makes statements which satisfy two or the four bases for removing the discretion to refuse to execute it. In doing so the conditions of section 20(3) , and if necessary, section 20(5) of the 2003 Act are met.

Oppression and suicide risk

44 Mr Grandison argued this part of the appeal, as he did the next, abuse of process.

45 The district judge considered both written and oral psychiatric evidence relating to the appellant. He approached the question whether the appellant's psychiatric condition would make it unjust or oppressive to order extradition in accordance with the guidance given by this court in *Polish Judicial Authority v Wolkowicz [2013] EWHC 102 (Admin)* . His conclusion was:

> "55. … a high threshold has to be crossed by the RP in showing that the risk of succeeding in committing suicide, whatever steps are taken, is great enough to amount to oppression.
>
> 56. On the available evidence I find that the RP IS at substantial risk of committing suicide if extradited; the very real attempt described and the evidence of likely deterioration in mental health if extradited satisfy me that substantial risk exists. However, despite the CPT reports and other criticisms made against the Romanian prison estate I am satisfied that the measures that will be put in place in order to cope properly with the mental condition and therefore the risk of suicide are such as to remove any substantial risk of it being successful, in combination with the presumption that a signatory to the European convention will abide by their obligations. I am satisfied that this challenge must fail in that the RP's mental health is not such so that extradition would be oppressive." (emphasis in the original)

46 The CPT report referred to by the district judge was from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. That body has produced a further report since the extradition hearing to which Mr Grandison referred without objection from Mr Knowles. The particular concerns expressed in those reports, which are echoed in a report from the United Nations Committee Against Torture, are that there is a shortage of psychiatrists employed in the Romanian prison estate and that the quality of psychiatric care is not good.

47 Mr Grandison submits that the general criticism of the scope and quality of psychiatric care in Romanian prisons amounts to a "specific matter that gives cause for concern" and so calls for a specific assurance from the Romanian authorities that it would be in a position to provide proper protection against the risk of suicide. It is not appropriate to rely upon the well-known

presumption that a Member State of the European Union can be relied upon to take appropriate measures to guard against a risk of suicide. The principle upon which Mr Grandison founds this submission appears in Wolkowicz at [10(iii)]. In *Cogan v The Provincial Court of Almeria [2015] EWHC 89 (Admin)* , I said this of a similar submission:

> "19. That reference was not designed to subvert the principle identified in the same sub-paragraph that a presumption operates that an EU state will discharge its responsibilities to prevent suicide in the absence of strong evidence, by enabling an appellant to raise 'concerns' and then set off on a quest for information and assurances. A specific matter will not give cause for concern unless it has a strong evidential foundation. It is clear from the final sentence of paragraph 10 of the Judgment that an appellant has to establish that a substantial suicide risk will not be appropriately guarded against."

Mr Knowles submits that the general concerns relating to the quality of psychiatric care in Romanian prisons falls far short of the type of evidence that would call for a specific assurance. The appellant would be surrendered to the Romanian authorities in the full knowledge of his psychiatric history, including risk of suicide and attempts at self-harm. It should be assumed that proper care will be taken of him, despite any shortcomings in the system. The reports do not provide support for the proposition that those known to be at risk of suicide are not given proper protection.

48 In my view Mr Knowles is right in his submission that the circumstances of this case are not such as to call for a specific assurance from the Romanian authorities before the appellant can be surrendered. It is true that the reports raise concerns about psychiatric treatment in the Romanian prison estate, but they do not suggest that those known to be at risk of suicide are not given appropriate protection.

49 Mr Grandison developed a more fundamental submission on the approach to suicide risk set out in Wolkowicz . He submits that earlier decisions of this court, which could be interpreted as imposing a lower hurdle before section 25 of the 2003 Act will prevent extradition, should be preferred. In short, he submits that Wolkowicz was wrong to set out a series of propositions which led to the conclusion in para [10] that,

> "It is therefore only in a very rare case that a requested person will be likely to establish that measures to prevent a substantial risk of suicide will not be effective."

50 Mr Grandison referred also in general terms to article 3 and 8 of the ECHR to suggest that section 25 oppression provides for a less onerous test than the Convention in cases such as this.

51 The cases on which Mr Grandison relied, and in particular *Jansons v Latvia [2009] EWHC 1845 (Admin)* , were cited and referred to in Wolkowicz . The judgment of the court in Wolkowicz , took account of a large body of case law and considered the statutory provision in the context of the Framework Decision . Its purpose was to establish clarity in an area where different formulations in a series of cases had resulted in a lack of clarity regarding the scope of section 25 in this context. Despite Mr Grandison's careful submissions, I am unpersuaded that it would be appropriate to revisit Wolkowicz on the basis that it is said to be wrong. It established the applicable principles after the fullest argument. It was neither *per incuriam* nor wrong.

52 In my judgment the district judge was entitled to come to the conclusion he did on the section 25 question.

Abuse of Process

53 Mr Grandison advances a short point by reference to the judgment of Lord Sumption in *Zakrzewski v Regional Court of Lodz, Poland [2013] 1 WLR 324* , where at [13] he set out the limited circumstances in which a demonstrable error in the EAW may result in its being discharged as an abuse of process. Mr Grandison submits that the EAW suggests that the appellant is sought to serve a sentence for the single aggravated burglary offence. He submits

that the sentence of 5 years and 10 months is a cumulative sentence for a number of offences. The sentence for the aggravated burglary was 3 years. The balance was accounted for by sentences imposed for previous offending which had been suspended, and which were activated. Section 2(6)(b) of the 2003 Act requires particularisation within the EAW of all the offences concerned.

54 I intend no disrespect to Mr Grandison's submissions on this ground in saying that there are two short and complete answers to it. First, Lord Sumption explained that the statutory particulars must be wrong or incomplete in some way that is misleading. “The true facts required to correct the error or omission must be clear and beyond legitimate dispute.” That is not the position here. The Romanian judicial authority has provided detailed information which shows that it does not accept the premise upon which the argument is advanced, and why it is wrong. Secondly, it is in any event clear from the information provided by the Romanian authorities, which condescends to some detail about the appellant's convictions and the applicable legal principles, that the argument advanced on his behalf is mistaken. The appellant has a number of convictions in respect of which he had gathered a series of custodial sentences which he had not been required to serve. The sentencing technique in Romania is different from that used in this jurisdiction, where suspended sentences might be activated in whole or part and ordered to run concurrently or consecutively. In Romania the previous offending and sentences are taken into account in determining the sentence for the instant offence. There is no activation of the previous sentence. That is what happened here. The sentence imposed was indeed for the aggravated burglary. It was enhanced on account of the appellant's previous offending. But he is not wanted to serve any previous sentence.

Conclusion

55 None of the grounds of appeal advanced on behalf of the appellant succeeds. I would dismiss the appeal.

Mr Justice Irwin

56 I agree.