Neutral Citation Number: [2022] EWHC 665 (Admin)

Case No: CO/269/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2022

Before

MR JUSTICE SWIFT

- -

Between

SALVATORE BERTINO **Appellant**

- and –

PUBLIC PROSECUTOR'S OFFICE, ITALY **Respondent**

- -
- -

Graeme Hall (instructed by **Lloyds PR Solicitors**) for the **Appellant**
Stefan Hyman (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 26 January 2022

- -

Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. On 18 January 2021 Deputy Senior District Judge Ikram ordered Salvatore Bertino's extradition to Italy. The order was made on a basis of a European Arrest Warrant ("EAW") issued on 6 February 2020 by the Italian Public Prosecutor's Office. The warrant was certified by the National Crime Agency on 26 February 2020. The warrant is a conviction warrant. On 16 April 2018 Mr Bertino had been convicted of an offence described in the warrant as an offence of child grooming. That decision became final on 31 July 2018. Mr Bertino committed that offence by sending WhatsApp messages to a 14-year-old girl asking her to perform oral sex on him. Mr Bertino was sentenced to serve 1 year in prison, suspended on condition of payment of compensation within 6 months. Mr Bertino did not pay the compensation required, with the consequence that the custodial sentence was activated by an order made on 20 January 2020.

2. At the extradition hearing the submission for Mr Bertino was that he should not be extradited by reason of section 20 of the Extradition Act 2003 ("the 2003 Act"). Section 20 of the 2003 Act applies to extradition pursuant to a conviction warrant. The court must decide whether the requested person was "convicted in his presence" (subsection (1)). If the person was convicted *in absentia* the court must then decide whether the requested person "deliberately absented himself from his trial" (subsection (3)). If the requested person did not deliberately absent himself, the court must discharge the warrant unless it decides that on surrender, the requested person "*would be entitled to a retrial or (on appeal) to a review amounting to a retrial*" (subsection (5)).

3. At the hearing before Judge Ikram the Requesting Judicial Authority did not submit that if surrendered, Mr Bertino would be entitled to a re-trial or equivalent appeal proceeding. The only issue was whether Mr Bertino had deliberately absented himself from the proceedings in Italy. The Judge's conclusion at paragraph 11 of his judgment, was that:

> "11. … I am sure that the RP demonstrated at least a "manifest lack of diligence" in moving addresses without notifying of an updated address and thus ensuring that he could not, personally, be served and notified of the date of his court hearing (but allowing service on a court appointed lawyer)."

4. That conclusion rested on the Judge's finding of fact that a document dated 23 July 2015 had been read to and signed by Mr Bertino at the Spadafora Carabinieri Station. That document included the following:

> "The person specified above is invited to declare or elect domicile in Italy under Article 161 of the Code of Criminal Procedure, and he is warned that, as he is being investigated, he is under an obligation to notify any change of his declared or elected domicile by a statement to be rendered to the judicial authority in charge pursuant to the relevant rules of procedure. The aforementioned person is also warned that if he does not

> notify any change of his declared or elected domicile, if his declaration or election is insufficient or not suitable, or if he refuses to declare or elect domicile, the service of any document will be executed by delivery to the defence lawyer of choice or to a court-appointed defence lawyer.
>
> In light of the above, the aforementioned person declared
>
> - **I hereby elect domicile for purposes of service of process in Venitco (Provence of Messina), via Paolo Sindoni No. 30, Brezza Marina, with my home address, and I will be assisted by a defence lawyer that will be appointed by the court.**
>
> - This record has been kept of the above, and after reading it out and confirming it, it has been signed by the official and Salvatore BERTINO, and a copy thereof is handed over to him in the place and on the day specified above."

In short, Mr Bertino provided an address for service and stated that he would be represented in the proceedings by a court-appointed defence lawyer.

5. The judge further found that Mr Bertino left Italy on 4 November 2015 to come to the United Kingdom, and at paragraph 10 of his judgment said as follows:

> "10. I find it no coincidence that the RP left his address without notifying a forwarding address and emigrated to UK within months of being released from the police station. He did so in full knowledge that the police wanted his address so they knew where court papers could be served. I find that he left the country so that he could not be located to be served with papers /future dates for his trial."

6. The Notice of Appeal against the extradition order was settled on 4 February 2020. The Notice contained three grounds: that the Judge had been wrong to conclude that Mr Bertino had deliberately absented himself (Ground 1A); that Mr Bertino had told the Italian Police that he was moving to the United Kingdom and for that reason had not shown a manifest lack of diligence (Ground 1B); and that Mr Bertino had not been warned that he might be tried *in absentia* (Ground 1C). Following a renewed application for permission to appeal, Whipple J granted permission to appeal, but only on Ground 1C: see her Order, sealed on 8 November 2021.

7. Very shortly before the hearing of this appeal, by an Application Notice filed on 21 January 2022, the Requesting Judicial Authority sought permission to rely on further evidence comprising: (a) a copy of a writ of summons dated 8 June 2017 (filed 12 June 2017) which informed Mr Bertino that the hearing of the case against him would take place on 28 September 2017; and (b) a document dated 18 January 2022 from the

Requesting Judicial Authority containing further information provided in response to a request sent by the CPS following Whipple J's decision to grant permission to appeal. The questions sent to the Requesting Judicial Authority were as follows:

> "1. Please can you provide us with a copy of the Writ of Summons for the hearing, which was sent by the judge, and can you confirm how this was served on Mr BERTINO.
>
> 2. Can you confirm that in accordance with Article 625-*ter* and 629-*bis* of the Code of Criminal Procedure, Mr BERTINO would be entitled to a retrial if he can prove that his absence is due to his blameless lack of knowledge of the proceedings.
>
> 3. Can you also confirm that in line with Article 175 of the Code of Criminal Procedure, the time for submitting a request to lodge an out of time appeal will still start on the date of the surrender of the convicted person."

8. In response, the Requesting Judicial Authority provided the writ of summons together with the following information (in a document dated 18 January 2022).

> "In reply to the request of UK Judicial Authority:
>
> (a) On 20 June 2015 Carabinieri of the Station of Bibione searched and seized computer-related material against Salvatore BERTINO, at the time an entertainer at a tourist resort.
>
> (b) Mr Salvatore BERTINO, within the framework of these criminal proceedings, and with reference to the proceedings, that lead to the search set forth in point (a) above, at the express request of the Carabinieri of Spadafora, was invited to *declare or elect domicile* for future service. On 23 July 2015 he *elected domicile* at his located in Venetico (Messina), Via Paolo Sindoni n.30. The records of his elected domicile signed by Mr BERTINO, (of which he was given a copy), read as follows, "the aforesaid is invited to *declare or elect domicile* (address of service) in Italy under Article 161 of the Code of Criminal Procedure and warned that, being under investigation, he is obliged to notify any change in his declared or elected domicile by making a statement as prescribed by procedural law to the competent prosecuting Judicial Authority. The aforesaid person is also warned that should he not notify any change in his elected or declared domicile, any incapacity, insufficiency or refusal to declare his domicile, service shall be effected by delivery to defence counsel of choice or court-appointed."
>
> (c) On 8 June 2017 a writ of summons was issued requiring Mr BERTINO to appear on 28 September 2017 before the Court

of Pordenone, but the service by post of the judicial document failed because the addressee was untraceable at the address of Via Sindoni 30, Venetico.

(d) Under Article 161, paragraph 4, of the code of criminal procedure, the writ of summons was served on the court-appointed defence counsel, Avv. Di Roma, practising in Trieste, and this was done because Mr Bertino had failed to notify any change in his address.

(e) The proceedings thus started in the absence of the defendant on 28.9.2017 and then postponed until 26.2.2018.

(f) The proceedings were carried out in absentia of the defendant.

Article 420 of the code of criminal procedure reads:

"*When a defendant, in custody or not in custody, is not present at the hearing and, even when impeded to do so, has expressly waived to take part, the court shall proceed in the defendant's absence. Without prejudice to Article 420 ter, the court shall also proceed in the absence of a defendant who during the proceedings declared or elected domicile*…

Article 625 ter of the code of criminal procedure reads:

1. A convicted person or a person subject to a detention measure by final judgment, who was absent for the whole duration for his/her proceedings, may ask for the judgement to be overturned if he/she proves that his/her absence was due to a blameless lack of knowledge of the proceedings,

2. The request shall be submitted, under the penalty of inadmissibility, personally by the person concerned or by his/her defence counsel empowered to do so by special power of attorney to act authenticated as prescribed by Article 583, paragraph 3, within 30 days of effective knowledge of the proceedings.

In consequence, if Mr BERTINO proves that his absence at the proceedings was blameless within 30 days of his effective knowledge of the proceedings, he will be granted a retrial by the Court of Appeal and the judgment of conviction of the first instance proceedings will be overturned.

I attach hereto the requested documents."

9. Mr Hall, who appears for Mr Bertino, objects to the application. So far as concerns the copy of the June 2017 summons, he submits that these proceedings have been on foot

since March 2020 and there is no reason at all why the document could not have been provided much sooner. As to the further information in the 18 January 2022 document, Mr Hall submits that in parts (sub-paragraphs (a) – (b) and (d) – (f)) the information reveals nothing not already known in these proceedings; in other parts (sub-paragraph (c)), admissibility of the further information should stand or fall with the application to rely on the June 2017 writ; and in further part (the references to article 625 of the Code of Criminal Procedure), the information is not relevant to any issue in the appeal.

10. Dealing with the last point first, I accept Mr Hall's submission. Whether or not Mr Bertino would be entitled to a retrial has never been an issue in these proceedings. It was not a matter raised at the extradition hearing; it was not mentioned in the Respondent's Notice. In his Skeleton Argument dated 21 January 2022, Mr Hyman, for the Requesting Judicial Authority submitted, for the first time, that the requirement at section 20(5) of the 2003 Act was met and that Mr Bertino would be entitled to a retrial. No application was made to amend the Respondent's Notice to rely on this new ground of opposition to the appeal. At the hearing I gave permission to the Requesting Judicial Authority to make an application to amend and gave directions for filing the application and any response to it. On 4 February 2020 the CPS wrote explaining that, on reflection, the Requesting Judicial Authority had decided not to pursue any application to amend, recognising that the matter had not been addressed at the extradition hearing. In the premises, it is now clear that the section 20(5) issue is not raised in these proceedings, and that being so I refuse permission to rely on the additional information in the 18 January 2020 document, so far as it relates to that matter.

11. I have decided to admit the remaining parts of the further information. The relevant principles are stated in the judgment of the Divisional Court in *FK v Germany* [2017] EWHC 2160 (Admin) per Hickinbottom LJ at paragraphs 38 to 40. The overriding consideration is whether it is in the interests of justice to admit the new information. In this case the new information arrived very late indeed. Mr Hyman submits that the prompt for the request was Whipple J's order granting permission to appeal. While I can see that may have been the premise for the request for information on the availability under Italian law of a right to retrial (i.e., the information I have already decided not to admit), it is less obvious why Whipple J's order was the occasion for the other enquiries, all of which in one way or another went to the circumstances in which Mr Bertino was tried *in absentia*. Nevertheless, the information now provided supplements the narrative of events of the course of the prosecution. It is relevant and helpful information. I do not consider that admitting the information now causes any prejudice to Mr Bertino in the conduct of his appeal, and it was no part of Mr Hall's submission that he required further time to deal with any matters arising from this part of the new material.

B. Decision

12. Mr Hall's submission for Mr Bertino is that the requirement at section 20(3) of the 2003 Act (that Mr Bertino "*deliberately absented himself from his trial*") is not met because he was not on notice that he could be tried and sentenced *in absentia*, and there is no evidence from which it could be inferred that he had waived the right to be present at his trial. Mr Hall's submission is to the following effect. *First*, that section 20 of the 2003 Act must be construed consistently with the relevant part of Council Framework Decision 2002/584/HJA ("the 2002 Framework Decision") namely article 4a. *Second*, that article 4a(1)(a)(ii) requires that a requested person must have actual knowledge that

he could be tried, found guilty and sentenced *in absentia* and this is a requirement that cannot be displaced by any submission that the requested person had failed to keep in contact with the police, prosecuting, or judicial authorities in the requesting state. *Third*, even if some form of waiver of the notification required by article 4a(1)(a)(ii) is permitted, the conclusion that the notification requirement has been waived may only be reached if it can be inferred from the circumstances that the requested person could reasonably have foreseen that he could be convicted and sentenced *in absentia*. On the facts of this case, Mr Hall submits that the Judge did not, when applying section 20 of the 2003 Act take account of the requirement at article 4a(1)(a)(ii) of the 2002 Framework Decision. He further submits that even if waiver is possible, there are no circumstances from which it could be inferred that Mr Bertino could reasonably have foreseen that if he did not attend the trial, it would take place, and he risked conviction and sentence *in absentia*.

13. I accept the first part of this submission. It is well-established that the provisions of the 2003 Act should be interpreted consistently with the provisions of the 2002 Framework Decision: see for example *Cretu v Local Court of Suceava, Romania* [2016] 1 WLR 3344 per Burnett LJ at paragraphs 14 to 17. This point was forcibly made by Irwin LJ in his judgment in *Szatkowski v Regional Court of Opole, Poland* [2019] 1 WLR 5248.

> "30. Section 20 of the 2003 Act represents the domestic legislature's reflection of article 4a(1). That said, it is plain that the terms of section 20, and in particular the terms of section 20(5) and (7) of the 2003 Act are not congruent with the terms of article 4a(1). That brings into play the principle of conforming interpretation. It is therefore the obligation of the English court, to interpret section 20 so as far as possible in the light of the wording and purpose of the Framework Decision in order to attain the result which it pursues.
>
> 31. In our judgment the result that is pursued by article 4a(1) is self-evident: it is to make provision to ensure that the article 6 rights of a person who is potentially subject to extradition because of a trial at which he was not present are protected. This is replicated to a substantial extent by the terms of section 20. The first question under both the article and the 2003 Act is whether the requested person was present at his trial. If he was not, there are potential article 6 concerns. Those concerns are met if he was deliberately absent, and the procedure then follows that laid down by section 21. If he was not deliberately absent, then there are potential article 6 concerns unless there has been or will be provision for a retrial. Article 4a(1)(c) deals expressly with the position where there was past provision for an effective retrial; article 4a(1)(d) separately makes express provision for a future effective retrial. Section 20 does not expressly distinguish or discriminate between past and future effective retrials: in other words, it does not expressly replicate the separate provisions of article 4a(1)(c) and (d).
>
> 32. It is therefore plain that the obligation to interpret section 20 so as far as possible in the light of the wording and

> purpose of the Framework Decision, in order to attain the result which it pursues, should lead to an interpretation that gives effect to both article 4a(1)(c) and article 4a(1)(d) unless such in interpretation contradicts the clear intent of the 2003 Act …
>
> 33. The clear intent of section 20 of the 2003 Act is to give proper protection to the requested person's article 6 rights. That intent cannot reasonably be said to be "contradicted" by an interpretation which allows a person to be extradited, when the only reason that he will not have the opportunity of a retrial on his return is that he had such an opportunity previously and chose not to take it. Nor is any guidance on this point to be gained from the fact that Parliament has not seen fit to amend section 20 in the light of article 4a. On the basis that our conforming interpretation is correct, there was no need for amendment, and it would be idle and irrelevant to investigate whether and if so why a decision not to amend was taken. In our judgment, for the reasons we have set out, the intent of article 4a and section 20 are essentially the same, so that an interpretation which leads to extradition on the facts of the present case goes with the grain of the legislation and does not contradict it. Indeed, the contrary reading would involve the absurd proposition that a potential extraditee can be returned if he has a right of appeal which he might waive but cannot be returned if he has already waived it.
>
> 34. We recognise that our proposed interpretation involves departure from the strict, literal or narrow interpretation of the words that the legislature has elected to use; and that it involves the implication of words necessary to comply with Community law obligations. But these are not impediments to conforming interpretation … The necessary sense can be achieved economically, as Ms O'Raghallaigh herself recognised in her written submissions, so that the subsection can be taken by implication to read "whether the person *was or* would be entitled to a retrial"."

14. However, so far as concerns the second part of the submission it is important clearly to understand what the Framework Decision requires. The purpose and effect of Article 4a is to be assessed in context. Article 1 of the 2002 Framework Decision provides as follows:

> "*Article 1*
>
> **Definition of the European arrest warrant and obligation to execute it**
>
> 1. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of

> conducting a criminal prosecution or executing a custodial sentence or detention order.
>
> 2. Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision.
>
> 3. This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

This establishes an obligation to surrender requested persons in response to EAWs, subject to consistency with the rights identified at article 6 of the Treaty on European Union, including the rights in the ECHR.

15. Article 4a of the 2002 Framework Decision is by way of derogation from article 1. Article 4a appears under the heading "*Decisions rendered following a trial at which the person did not appear in person*" and, so far as material, provides as follows:

> "*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.
>
> …"

16. Thus, Member States are permitted (although not required) to decline to extradite in response to a request in an EAW if the person concerned did not appear at trial. The sub-paragraphs within article 4a(1) set out circumstances in which the obligation to extradite arises again. Sub-paragraph (a), the relevant provision for present purposes, is to the effect that even if the person did not appear at trial, the obligation to extradite will arise if he was "*aware of*" the scheduled date and place of trial and "*was informed*" that a decision could be reached in his absence.

17 In this way, article 4a(1)(a) is asymmetric. On the one hand if the requested person had actual knowledge of the official notification of the date and place of trial and was told that he might be tried and sentenced *in absentia*, the obligation to surrender pursuant to

article 1 of the 2002 Framework Decision arises again. Put in the terms of section 20(3) of the 2003 Act, such a person must be taken to have deliberately absented himself from his trial. On the other hand, if the requested person does not have such actual knowledge, the opening words of article 4a govern – the executing judicial authority may, but is not required to, refuse to surrender. In such circumstances there is no ready-made answer to whether the criterion established by section 20(3) of the 2003 Act has been met. Rather, the court must consider the position further for itself.

18. This conclusion is not new. For example, it is the reasoning in *Dziel v District Court in Bydgoszcz, Poland* [2019] EWHC 351 (Admin) see generally per Ouseley J at paragraphs 14 – 16 (and the cases referred to); see also *TR v Generalstaatsanwaltschaft Hamburg*, Case 416-20 PPU at paragraphs 41 and 51 – 52.

19. The same point is apparent in the reasoning of the CJEU in *Dworzecki* (Case 108/16 PPU). In that case a Dutch court referred questions to the Court on the requirements arising from article 4a (1)(a)(i) of the 2002 Framework Decision. On the facts of the case before the referring court, the summons requiring attendance at trial (which contained the information specified at article 4a(1)(a)(i)) was sent to the address Mr Dworzecki had provided and was collected by his grandfather. (Under the Polish Code of Criminal Procedure Service on an adult resident at the address given for service was sufficient.) However, there was no evidence that the summons had come to Mr Dworzecki's attention, or that he had actual knowledge of the date and place of the trial. The CJEU concluded that on these facts the requirements of article 4a(1)(a)(i) had not been met: see judgment at paragraphs 47 and 49. However the Court then continued as follows:

> "50. Furthermore, as the scenarios described in Article 4a(1)(a)(i) of Framework Decision 2002/584 were conceived as exceptions to an optional ground for non-recognition, the executing judicial authority may in any event, even after having found that they did not cover the situation at issue, take into account other circumstances that enable it to be assured that the surrender of the person concerned does not mean a breach of his rights of defence.
>
> 51 In the context of such an assessment of the optional ground for non-recognition, the executing judicial authority may thus have regard to the conduct of the person concerned. It is at this stage of the surrender procedure that particular attention might be paid to any manifest lack of diligence on the part of the person concerned, notably where it transpires that he sought to avoid service of the information addressed to him."

20. The reference to "manifest lack of diligence" is a nod to Recital (8) to Council Framework Decision 2009/299/JHA ("the 2009 Framework Decision"), the instrument that amended the 2002 Framework Decision by, among other matters, inserting article 4a. Recital (7) to the 2009 Framework Decision anticipates the requirements of the new article 4a(1)(a), identifying their purpose as one way in which it can be established

that surrender of the requested person is consistent with his rights of defence. Recital (8) then says this:

> "(8) 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."

Thus, if a requested person failed to exercise due diligence to obtain information addressed to him about his trial, and for that reason failed to receive information about his trial, that failure could be relevant to whether his surrender could be consistent with this right to a fair trial.

21. In *Dziel*, Ouseley J explained the matter in this way.

> "30. The concept of a "manifest lack of diligence" covers the concept of "deliberate absence"; see [81] of *Zagrean*. It may go wider with its connotations of negligence and inefficiency; but that cannot broaden the meaning of "deliberate absence" in the Extradition Act. "A manifest lack of diligence" only illustrates one set of circumstances in which EU law permits but does not require the executing authority to order or to refuse to order the extradition of a person who was not present at his trial. Section 20 is not in conflict with it; section 20 may lawfully restrict the Framework's discretion to order extradition; it cannot and does not permit a refusal of extradition, where the article 4a bars to the refusal of extradition bite. In any event, this notion of a "manifest lack of diligence" drawn from [51] of *Dworzecki* , may need to be read with [52] in which the CJEU discusses the availability in Poland of re-trial rights in the sort of circumstances which arose in that case."

Ouseley J then considered circumstances in which the requirements of ECHR article 6 would be met notwithstanding that a defendant not present at his trial did not have actual knowledge of the date and place of the hearing.

> "31. There is nothing in ECtHR jurisprudence to suggest that, where a defendant deliberately breaches his obligations to inform the authorities of his changes of address so as to prevent the authorities informing him of the date and place of trial, as here, a subsequent trial in his absence is in breach of article 6. That may be seen as a waiver of the right to attend his trial or as a deliberate decision not to exercise the right to attend his trial.
>
> 32. In the light of the *Jones* decisions, Strasbourg jurisprudence does not require waiver with full knowledge of the rights foregone, namely that the trial could proceed in his absence, for a trial in the absence of the defendant to comply with article 6. Strasbourg only required that that outcome could be "reasonably foreseen", which it elaborated no further, for a waiver to arise. What prevented a trial in the deliberate absence of Jones being "reasonably foreseen" by him was that the state of the law in England and Wales on that point was not certain, as Lord Rodger had explained. If Jones did not waive his right to attend through his deliberate absconding, it was because it was not known by anyone that a trial could be held in his absence, rather than that his knowledge of procedural law was inadequate. It may be that the notion of what could be "reasonably foreseen" was introduced to deal with the absence of an individual's actual knowledge of readily ascertainable procedural law. What could reasonably be foreseen is that which is reasonably foreseeable.
>
> …
>
> 34. The *Jones* decision in the House of Lords makes clear that deliberate absconding, in breach of bail obligations, can amount to a waiver of the right to attend, or as the deliberate exercise of a choice not to attend. It may also be found in a complete indifference to the procedures which may be followed in his absence, including trial itself. In none of those circumstances would trial breach article 6.
>
> 35. In my view, and in the light of *Cretu* and *Zagrean* , the same approach applies to a failure to attend where the inability to do so is the result of a deliberate decision to breach an obligation to provide the authorities with information about changes of address, so as to prevent them actually notifying a defendant of the date and place of trial. That is how the District Judge has found Mr Dziel conducted himself and why."

22. In the present case no issue remains on whether Mr Bertino deliberately absented himself from his trial. On the facts found by the Judge at the extradition hearing, Mr Bertino knew he had to ensure the authorities had up to date contact information for him. He provided an address, but then left that address without providing further information, and left Italy "*so that he would not be located to be served with*

papers/future dates for his trial": see Judgment at paragraph 10. That conclusion was challenged by Grounds of Appeal 1A and 1B but permission was not granted for either of those two grounds to proceed. What remains concerns only the point on whether Mr Bertino was aware that he could be tried and sentenced *in absentia*.

23. The second part of the submission for Mr Bertino in this appeal is that being told of the possibility of trial and sentence *in absentia* is something distinct from being given information about the place and date of trial. The submission is that no question of waiver of rights can arise when it comes to a person being told he could be tried *in absentia*. Instead, that information must always be conveyed to the person concerned and received by him, and unless that happens, extradition is prevented by section 20 of the 2003 Act. Section 20(3) must be read so that a person who has not been told that he could be tried and sentenced *in absentia* may not be regarded as having deliberately absented himself from his trial.

24. I do not accept this submission. I do not agree there is any reason in principle to distinguish between a requested persons's knowledge of the date and place of trial and his knowledge that if he does not attend trial, he could be tried *in absentia* to establish a requirement under article 6 for actual knowledge of the latter. The material part of article 6 is the requested person's right to be present at trial. It is well established this right may well be waived. Waiver may be either express or inferred. For present purposes express waiver can be put to one side. Absent express waiver, in each case the issue will be whether it is appropriate on the facts to infer that the requested person has waived his right to be present at trial. Whether a requested person's conduct will be taken to amount to a waiver of his right to be present at trial will include consideration of what he could reasonably have foreseen to be the consequences of his conduct. When a requested person such as Mr Bertino, acts to avoid being contacted by the authorities, to prevent them informing him of the date and place of trial, the question is whether it is appropriate to infer from that that he has waived his right to be present at trial.

25. Seen in this way, there is no relevant distinction between knowledge of the date and place set for trial and knowledge that the trial may take place even if the requested person does not attend. If it can be shown that the requested person did know that if he failed to attend, he could be tried *in absentia* that would go to support a conclusion that he had waived his right to be present at trial. But want of such evidence will not, of itself, prevent an inference of waiver. The question will remain what the requested person ought to have reasonably foreseen to be the consequence of his conduct.

26. I do not agree that anything in the 2009 Framework Decision requires any different conclusion. The operative provision – i.e., article 4a, the provision inserted into the 2002 Framework Decision – draws no such distinction. Article 4a(1)(a) only provides that the executing authority's obligation to extradite applies notwithstanding the requested person's absence at trial, if the requested person has received "*official information of the scheduled date and of … trial*" and "*was informed that a decision may be handed down if he or she does not appear for the trial*". Where those conditions are met that would be the clearest evidence that the requested person had waived his right to be present at trial.

27. Mr Hall attaches particular importance to Recital (8). He submits that the reference there to the relevance of "*the diligence exercised by the person concerned in order to receive information addressed to him or her*" only applies to knowledge of the date and

place of trial. This is a significant over-reading of Recital (8). Recital (8) is dealing with the right to appear in person at trial; it is emphasising that for the purposes of the Framework Decision this right is the same as the right guaranteed under ECHR article 6; the words at the end of Recital (8) do no more than acknowledge that the article 6 right to be present at trial can be waived, and that what the requested person did or did not do that affected whether the authorities could communicate with him will be relevant in that regard.

28. Mr Hall further submitted that the judgment of Hickinbottom J in *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 (Admin) was authority for the proposition that anything short of actual knowledge that a decision could be taken *in absentia* was a bar to extradition. I do not agree. The material part of the judgment is paragraphs 54 to 57.

> "54. It cannot be assumed from the sparse information available that "proper notification about the trial date", in accordance with Polish procedure, amounted to either personal service or notification such the Appellant actually received the relevant information as to time and place of the trial; particularly in the light of *Dworzecki*. That case proceeded on the basis that, in respect of service of criminal process, article 132 of the Polish Code of Criminal Practice states that:
>
> > "In the event of the addressee's absence from home, the process is to be served on an adult of the addressee's household – if also absent, the process can be served on the landlord or the caretaker of the village chief – on condition they undertake to pass the process on to the addressee."
>
> The summons was sent to the address given for service by the individual and was collected from there by his grandfather. The Court of Justice held that, for the purposes of article 4a(1)(a), that did not amount to "personal service"; and, to satisfy the second limb, the judicial authority would have to establish unequivocally that the third party actually passed on the summons … It is clear from that case that compliance with that provision of the Polish Code does not of itself unequivocally establish that the criteria in article 4a(1)(a) have been met. In the case before me, there is no evidence that article 132 is not still the relevant provision in the Polish Code; nor that it was under some other provision that the Appellant was notified of the relevant details of his trial.
>
> 55. I accept that the Appellant left Poland knowing that a suspended sentence was hanging over him and he had recently been arrested for a further offence which the authorities had indicated they intended to pursue. He was also aware that, by not keeping in touch with his probation officer and not notifying the Polish authorities of changes of his address, he was failing to comply with obligations attached to both suspension and release. I accept that, by moving to the UK, the Appellant made

> it more difficult for the authorities in Poland to serve him with documents relating to his trial. However, he took no steps to conceal himself or his identity in the UK; and when, in 2005, the Polish authorities went to his address they learned that he had moved to the UK three years earlier. It seems that, before then, they had taken no steps to find out where he was. Even when they found out he was in the UK, there is no evidence that they took any steps whatsoever to find out his precise address, which could have easily been ascertained from the UK authorities, e.g. the Home Office, or the UK tax authorities with which he was registered. In all of the circumstances, I am not satisfied that the Appellant's surrender would not breach his rights of defence.
>
> 56. In any event, there is no evidence at all that the Appellant was informed that a decision may be handed down if he did not appear for the trial, and so the criterion in article 4a(1)(a)(ii) was not met.
>
> 57. Therefore, on the evidence, the Judicial Authority has failed to satisfy me that the requisite criteria for notification set out in article 4a(1)(a) were met in this case. In my judgment, the District Judge was therefore wrong to find that the Appellant deliberately absented himself from his trial."

29. What is clear from this is that Hickinbottom J approached that case by asking whether the conditions at article 4a(1)(a) of the 2002 Framework Decision were met. He concluded they were not. In context, paragraph 56 of the judgment is not asserting that, absent actual knowledge that a decision could be taken *in absentia*, extradition would be barred by section 20 of the 2003 Act, or even by article 4a of the 2002 Framework Decision. The only point being made was that on the facts of that case the condition at article 4a(1)(a)(ii) to the executing state's obligation to extradite in response to the EAW had not been met.

30. A further point was made by reference to paragraph 50 of Hickinbottom J's judgment in *Stryjecki*, although it is not a matter that goes to the heart of any issue in the present appeal. At paragraph 50 Hickinbottom J sought to summarise points arising from various judgments including *Dworzecki* and *Cretu* in seven sub-paragraphs. Sub-paragraphs (vi) and (vii) were as follows:

> "vi) Establishment of the fact that the requested person has taken steps which make it difficult or impossible for the requesting state to serve the requested person with documents which would have notified him of the fact, date and place of the trial is not in itself proof that the requested person has deliberately absented himself from his trial.
>
> vii) However, where the requesting authority cannot establish that the person actually received that information because of "a manifest lack of diligence" on the part of the requested person,

> notably where the person concerned has sought to avoid service of the information so that his own fault led the person to be unaware of the time and place of his trial, the court may nevertheless be satisfied that the surrender of the person concerned would not breach his rights of defence."

31. Subsequent judgments have either cast doubt over sub-paragraph (vi) (see *Tyrakowski v Regional Court in Poznan, Poland* [2017] EWHC 2675 (Admin) per Julian Knowles J at paragraph 30, and *Dziel* (above) per Ouseley J at paragraph 17), or endorsed the summary overall (see *Szatkowski v Regional Court in Opole, Poland* (above) per Irwin LJ at paragraph 22).

32. Taken in isolation, sub-paragraph (vi) appears awkward. However, one must have well in mind that passages in judgments such as paragraph 50 in *Stryjecki* are no more than summaries, prepared only for the purposes of exposition. They are not and should not be treated as attempts at codification; they are not to be parsed in a manner of sacred texts. They are helpful but they must be understood with proper regard to context. For example, in *Bialkowski v Regional Court in Kielsce, Poland* [2019] EWHC 1253 (Admin), when this run of cases was presented to Kerr J, he said this:

> "27. For my part, I respectfully consider that the seventh proposition is sound and that the sixth proposition can be reconciled with what was said by Cranston J in *Cretu* at [81]. I think Hickinbottom J was simply making the point that the requesting state does not prove that an accused deliberately missed his trial just by proving that he acted evasively in an attempt to avoid receipt of trial information documents. However evasive the accused's conduct, the requesting state must still prove that it took the steps that would acquaint a non-evasive accused with the time and place of trial."

Respectfully, I agree.

33. Be that as it may, I do not consider the judgment of Hickinbottom J in *Stryjecki* to be authority for the proposition that where a requested person has been dealt with *in absentia* (and no relevant right of retrial exists) extradition will not be possible unless he was told that if he did not attend his trial, it would go ahead without him. The correct enquiry in such a case will be whether, looking at the circumstances of the case overall, it is appropriate to infer that the requested person waived his right to be present at trial. This requires consideration of what the requested person could reasonably foresee as the consequences of his conduct.

34. The final part of the submission for Mr Bertino is that in this case the Judge did not address waiver properly because he made no express reference to whether Mr Bertino could reasonably have foreseen that if he did not attend the trial he could have been dealt with *in absentia*. Mr Hall's submission placed reliance on the judgment of the European Court of Human Rights in *Jones v United Kingdom* (2003) 37 EHRR CD

269. I do not consider this case to be conclusive of the present appeal. Mr Jones was on bail pending trial on charges of conspiracy to rob. He did not surrender for trial and the conclusion reached was that he had deliberately chosen not to attend. However, the European Court of Human Rights concluded Mr Jones had not "*unequivocally and intentionally*" waived his article 6 right to be present at trial because at that time it had not been clearly established as a matter of English law that a trial could start if the defendant was not present (see generally, the judgment of the House of Lords in *R v Jones* [2003] 1 AC 1). Thus, the European Court of Human Right's decision in *Jones* establishes only that deliberate absence from trial may not, regardless of all the other circumstances, demonstrate waiver of the right to be present at trial. It is not authority for the proposition that an inference of waiver cannot be drawn from a conclusion that the requested person deliberately absented himself from trial. In this way there is no inconsistency between the decision in *Jones* and the steps set out in section 20 of the 2003 Act.

35. In this case the Judge applied the statutory test – had Mr Bertino deliberately absented himself from trial? He concluded that Mr Bertino left Italy so he could not be located and could not be served with information about his trial. He concluded Mr Bertino acted intentionally. He also concluded that Mr Bertino realised that having absented himself, any court documents would be sent to his court-appointed lawyer. Indeed, that was a point made expressly in the document dated 23 July 2015 which the Judge concluded had been read to Mr Bertino and signed by him: see generally paragraphs 10 and 11 of the Judgment.

36. The Judge did not, in terms, state that it would have been reasonably foreseeable to Mr Bertino that if he acted as he did – i.e., intentionally, to avoid being served with information about his trial – he would be dealt with in his absence. However, given the conclusions of the fact (both primary and secondary) that the Judge did reach, it is plainly correct to draw that inference too. On this appeal, the question for me is whether the Judge should have been decided the section 20 question differently. I am satisfied that the answer to this question is no. The Judge reached the correct conclusion on the application of section 20 to the facts of this case. In the premises, the appeal is dismissed.
