Neutral Citation Number: [2023] EWHC 692 (Admin)

Case No: CO/1439/2021

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

Tuesday, 28th March 2023

Before:
MR JUSTICE FORDHAM
- -

Between:

KALMAN NEMETH	**Appellant**
- and -	
JUDGE OF THE DISTRICT COURT OF BUDAPEST, HUNGARY	**Respondent**

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Louisa Collins (instructed by Taylor Rose MW Solicitors) for the **Appellant**
Amanda Bostock (instructed by CPS) for the **Respondent**

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Hearing date: 8.3.23

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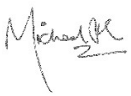
Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a case about whether extradition is barred by reason of "absence of prosecution decision", pursuant to s.12A of the Extradition Act 2003. The leading case on s.12A is Puceviciene v Lithuania [2016] EWHC 1862 (Admin) [2016] 1 WLR 4937 (DC 22.7.16). The Appellant is aged 29 and is wanted for extradition to Hungary. That is in conjunction with an accusation Extradition Arrest Warrant ("ExAW") issued on 24 September 2019 and certified on 21 February 2020, on which he was arrested on 18 June 2020. After an oral hearing on 18 March 2021, District Judge Rimmer ("the Judge") on 15 April 2021 ordered the Appellant's extradition. Among the issues addressed in the Judge's judgment ("the Judgment", in which the Appellant is "RP" for requested person) was the s.12A bar. The question on this appeal is whether the Judge ought to have decided that question differently, ordering the Appellant's discharge (see s.27(3) of the 2003 Act). The alleged index offence, for which the Appellant's extradition is pursued, was identified in the Judgment as follows:

> ***The conduct is described as an offence of knifepoint robbery committed on 17 November 2016 at 01.10 hours in Budapest. The RP acted with an accomplice to rob the complainant, Gary Russel Thomson, of cash in the street at night. They asked the complainant for money to pay for [a] bus ticket. The victim took out 1,000 HUF (then equivalent to approximately £2.76) from a money clip. When he tried to put the money clip back into his pocket, the RP pulled out a 7cm long knife and pointed it towards the victim's abdomen from half a metre away. The RP and his accomplice took a total of 40,000 HUF (then approximately £100). When the victim tried to recover the money, the RP "stabbed towards" the complainant and ran away. The accomplice then punched the complainant in the face causing him to fall over. The monies were not recovered.***

At the oral hearing before the Judge the Appellant gave evidence and was cross-examined. He claimed to have come to the UK from Hungary a few days before 17 November 2016, the date of the alleged offence. The Judge rejected that evidence.

Section 12A

2. Section 12A is headed "absence of prosecution decision" and provides as follows:

> ***(1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if): (a) it appears to the appropriate judge that there are reasonable grounds for believing that: (i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and (ii) the person's absence from the category 1 territory is not the sole reason for that failure, and (b) those representing the category 1 territory do not prove that: (i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or (ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.***

In this case, Hungary – the requesting state in the extradition proceedings – is the "category 1 territory". The Judge was "the appropriate judge".

3. As Lord Thomas CJ explained in Puceviciene at §6:

> ***In essence, the s.12A bar to extradition only operates if (1) there are reasonable grounds for believing that one or more of the required decisions have not been made, and not made for a reason other than the requested person's absence from the requesting state, and then (2) the requesting judicial authority fails to establish, to the criminal standard of proof, that in fact both required decisions have been made or that the only reason for both of them not having been made is the requested person's absence from the requesting state.***

4. Section 12A operates as follows. (1) There are two prosecutorial decisions required to have been "made" by the requesting state's competent authorities (the "Required Decisions"). The Required Decisions are (a) the "decision to charge" the requested person, and (b) the "decision to try" the requested person. (2) Where there is a relevant doubt (the "Relevant Doubt") as to whether one or both of the Required Decisions has been made, there is a permitted excuse for that "failure" (the "Permitted Excuse"). The Permitted Excuse is that the requested person's "absence from the territory" is the "sole reason" for the failure. (3) Extradition is barred where there is a Relevant Doubt: (a) about whether one or both of the Required Decisions has been made; and (b) about whether the Permitted Excuse applies to that failure. (4) Deciding whether there is a Relevant Doubt involves two sequential stages. Each stage places an onus and poses a question. (5) At the first stage the onus is on the requested person and the question identifying the Relevant Doubt is whether they can point to "reasonable grounds for believing". If not, the second stage is not reached. (6) At the second stage the onus is on the requesting state and the question identifying the Relevant Doubt is whether the requesting state can "prove" matters. That means to the criminal standard (s.206): beyond reasonable doubt.

5. Section 12A may come to be applied at "a single hearing at which all issues are resolved" with questions "identified well in advance" and all "questions and answers" provided (Puceviciene at §35). That is so, "even though the section contemplates two different stages" (also at §35). Or there may be sequential hearings. There may be a hearing at which the first stage question is asked ("reasonable grounds for believing") as a "preliminary hurdle", with an adjournment following for "further information" to be elicited to "prove" the points at the second stage (Puceviciene §17). Or there may be a "single hearing" which uses a "two stage inquiry" (§38). This could start by asking whether the requested person has established the first stage Relevant Doubt ("reasonable grounds for believing") and, if not, going no further. In the present case, there was a single hearing before the Judge dealing with the s.12A issues, based on the evidence as a whole and having heard the arguments on both sides. In such a case, as it seems to me, the differently expressed formulations of the Relevant Doubt, at the two distinct stages, may merge into one. The absence, in the end, of "reasonable grounds for believing" could be because the requesting state has been able to "prove" matters beyond "reasonable doubt". That may be expressed as the requested person failing to establish "reasonable grounds for believing". If, having heard all the arguments and considered all the evidence, the court is satisfied that the s.12A bar does not apply, the questions at the two stages may thus become two sides of the same coin. If, in the end, what persist are "reasonable grounds for believing", I cannot see how "reasonable doubt" can at the same time have been eliminated by proof. I can see that the question could then be whether to keep the emphasis on the first stage question being met, with an adjournment and a request for further information – or even a further adjournment and request – allowing the requesting state a (further) opportunity to meet the second stage question.

6. I will set out here some of the key propositions about s.12A which, as it seems to me, arise from Puceviciene:

i) The "purpose" of s.12A is "to ensure that individuals are tried expeditiously following their surrender" (Puceviciene §4ii); to "ensure", "before extradition can occur", "that a case is sufficiently advanced in the issuing state", meaning there is "a clear intention to bring the person to trial"; so that people "do not spend potentially long periods in pre-trial detention following extradition", while the issuing state "continues to investigate the case" (§§11-12). The "mischief at which the section is directed is the possibility of a person being surrendered and then languishing in custody while the alleged crime continues to be the subject of lengthy investigation without [a] decision to charge and try having been made" (§73).

ii) The "relevant time", for examining whether the Relevant Decisions have been made or whether the Permitted Excuse is applicable, is the present: the time of the Judge's decision or the decision of the High Court on appeal (§65).

iii) A "cosmopolitan interpretation" (§11) and "cosmopolitan approach" (§19) are called for (also §§38, 81): "which accommodates and reflects the criminal procedures of other countries, rather than those in the UK", to "avoid emplacing significant but unintended barriers to extradition on a speedy basis, while still respecting the purpose of s.12A" (§11). It is necessary to take into account the "diversity of procedures" where "the procedure for bringing alleged criminals to justice varies very considerably between states" (§39), with "substantial differences" (§42). Although "systems for criminal procedure will have usually (i) a stage where investigation is the focus; (ii) a stage where the prosecutor with conduct of the prosecution in court considers whether to bring a charge, whether to proceed to trial and prepares for trial and (iii) a trial stage", nevertheless "the boundaries between the stages are not necessarily precise and activities generally attributable to one stage can be carried out in the course of another" (§39). Even in England and Wales, for example, "investigation" may often continue after the stage of a decision to charge and to try the defendant (§40i).

iv) A "decision to charge" means deciding to make the criminal allegation. It is "the decision which is made when there is sufficient evidence under the relevant procedural system to make an allegation that the defendant has committed the crime alleged" (§55). It is "the decision to make the allegation that the person has committed a criminal offence" (§56).

v) A "decision to try" means deciding to go ahead to a criminal trial. It is "where the relevant decision-maker has decided to go ahead with the process of taking to trial the defendant against whom the allegation [is] made" (§56). A "decision to charge" may "also be" a "decision to try" (§56). The relevant decision-maker may be "a police authority, prosecutor or judge" (§56). The "real focus" is "always on whether there has been a decision to try": if so, a decision to charge will inevitably have been taken earlier or at the same time; if not, whether there has been a decision to charge is irrelevant (§50vi).

vi) There must be a "decision"; not a mere "intention": "an intention to try is not of itself a decision to try" (§204iii). But neither "decision" requires to have been actioned, effected or implemented. The "decision to charge" may need a future act "proceeding to make the charge" (§55). The decision to try does not mean that any trial proceeding has started. The decision-making prosecutor may be "going to charge and try" the defendant when able to "find" them and "conclude the procedures" (§128iv).

vii) Neither decision need be "formal"; either or both may be "informal". There is "no reason why any formality is required in relation to the making of a decision" (§§54, 128vii, 204); "a decision is a decision even if informal" (§56).

viii) Either "decision" may be conditional, or subject to review. For example, it may be conditional on hearing what the defendant has to say. So, a decision to charge can be "conditional upon hearing what the defendant has to say"; it may remain "necessary to put the allegation to the defendant and hear what [they have] to say"; and there may need to be an act "confirming the decision and proceeding to make the charge" (§55). Likewise, a decision to try is "none the less a decision to try even if it is conditional or subject to review" (§54); a decision to try may be "taken subject to the completion, after extradition, of formal stages, such as an interview and subject to those stages not causing a reversal of the decision already made even informally, to charge and try" (§54): it may be "a decision that the matter will proceed to trial, subject to hearing what the defendant has to say" or subject to a "subsequent review" (§56); it may be "conditional or contingent upon other matters" (§56).

The ExAW

7. Three parts of the ExAW were emphasised in submissions on this appeal:

i) First, there is the usual "pro forma" (see Puceviciene §4ii) preamble, which states:

> ***This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.***

ii) Secondly, the text in box (e) "offences" (under the heading "description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person") includes this:

> ***Based on the available information: At about 01:10 am on 17 November 2016, Kalman Nemeth and his accomplice, remained unknown during the investigation up to now, accosted [the] Victim …***

iii) Thirdly, the text in box (f) (under the heading "other circumstances relevant to the case (optional information)"), includes this:

> ***The investigation is still pending, the investigating authority wishes to interview Kalman Nemeth as a suspect; therefore, a domestic arrest warrant was issued against him on 18 November 2016, besides continuing the investigation…***

Further Information: Including the Questions

8. There was Further Information (4.2.21), in answer to Questions asked by the CPS. It was common ground that Further Information can be treated as "part and parcel" of the ExAW (as to which, see Litwinczuk v Poland [2019] EWHC 2745 at §23). The Judge analysed the Further Information making reference to the Questions which it was answering. The Questions were produced, at my request, at the hearing of the appeal. This is important. Candour and comprehension of Further Information require proper visibility of the Questions. In Puceviciene itself Lord Thomas CJ said this (at §§20, 23):

> ***Where questions are asked of the requesting judicial authority by the CPS (acting in its capacity as a representative of the judicial authority under s.190 of the Act), it is highly desirable that the questions be provided to the court and to the requested person, as well as the answers. The questions, and their precise terms, are often essential to understanding the significance of the answers.***
>
> ***It is clear in our view that when answers to questions are put before the court, the questions and the information supplied to the requesting judicial authority to enable it to understand the questions … must also be put before the court.***

The Further Information: (1)-(4)

9. The first four Questions were:

> ***(1) Have you made a decision to charge Kalman Nemeth (i.e. a decision that there is sufficient evidence to allege that he has committed the offence in the EAW), even though you may not be able to take the formal procedural steps under Hungarian law? (2) If not, is his absence from Hungary the sole reason that you have not made the decision in question (1)? (3) Have you made a decision to try Kalman Nemeth (i.e. a decision to take him to trial for the offence in the EAW), even though you may not be able to take the formal procedural steps under Hungarian law? (4) If not, is his absence from Hungary the sole reason that you have not made a decision in question (3)?***

10. The Further Information answered those Questions as follows:

> ***(1) Based on the viewpoint of the district prosecutor's office carrying out the supervision of the investigation, there is enough evidence to establish that the criminal offence included in the European arrest warrant had been committed by Kalman Nemeth, with special regard to the available surveillance camera recordings of the commission of the criminal offence and the perpetrators' escape route as well as the result of the presentation for identification. (2) In the Hungarian law and order, there is no legal institution to deliver a special formal decision on the above fact; therefore, no decisions have been passed in this regard. (3) It has not been moved that Kalman Nemeth, being absent, be declared as the defendant and a court procedure be conducted in his absence. (4) Although the conditions of holding a procedure with absence are met, but the investigating authority wished to provide an opportunity, on the one hand, to file a defence on the merits during a suspect interrogation in case of the defendant being caught within a reasonable period, and on the other hand, to name his accomplice as the criminal offence included in the European arrest warrant was committed by Kalman Nemeth and his accomplice whose identity is still unknown.***

The Further Information: (5)-(12)

11. The remaining Questions were:

> ***(5) Was Kalman NEMETH ever arrested / questioned in respect of these offences? (6) Was Kalman NEMETH made aware of the prosecution? If so, how was Kalman NEMETH made aware? (7) Please account for any delay in the period between the date of the offence and the EAW being issued. (8) What efforts were made to trace Kalman NEMETH between the date of the offence and the EAW being issued? (9) Was there any contact between the authorities and Kalman NEMETH during this period? If so, please give us details of the frequency and nature of the contact. (10) Was Kalman NEMETH permitted to leave the jurisdiction of the requesting Judicial Authority? (11) Was Kalman NEMETH under any obligation to inform the Prosecuting Authorities of his whereabouts? If so, has Kalman NEMETH complied with this requirement? (12) Is there any evidence that Kalman NEMETH has attempted to evade the investigation or prosecution of the offence? If so, how has he attempted to evade investigation and then prosecution?***

12. The Further Information answered those remaining Questions as follows:

> ***(5) The measures taken to find suspect Kalman Nemeth were unsuccessful, so the suspect interrogation could not be held. (6) In the scope of the measures taken to find the suspect, the investigating authority visited the defendant's known residences and contacted his family; therefore, the defendant may have learnt of the criminal procedure pending against him. No summons for the purpose of holding the suspect interrogation have been served on him. (7) The investigating authority suspended the investigation by its decision dated 31 May 2017 with regard to the fact that Kalman Nemeth was residing at an unknown place. However, after that, further measures have been taken to find him. As a result of these measures being unsuccessful, the investigating authority moved the issuance of a European arrest warrant on 16 August 2019, based on which the district prosecutor's office proposed, out of turn, the issuance of the European arrest warrant on 03 September 2019. Without delay, the European arrest warrant was issued on 24 September 2019. (8) The investigating authority checked Kalman Nemeth's known places of residence. For the purpose of establishing his place of residence, the investigating authority issued requests to the electronic communications service providers, organisations and social institutions handling the health and personal data, but all of them were unsuccessful. (9) There was no contact between Kalman Nemeth and the authorities after the commission of the criminal offence. (10) Kalman Nemeth has not been restricted in travelling, he may have left the country legally before the issuance of the domestic arrest warrant. (11) In the Hungarian law and order, the obligation to report the change of address shall take place simultaneously with the suspect interrogation, which the investigating authority did not carry out due to the above objective reasons. (12) Finding Kalman Nemeth was unsuccessful even directly after committing the criminal offence, he may have learnt of the initiation of the criminal procedure from his relatives contacted during the search. Considering his arrest abroad, he actually left for abroad at an unknown time. Based on these circumstances, the above-named person rescued himself from the criminal procedure.***

The Approach on this Appeal

13. It was common ground that, for the purposes of this appeal, this Court should evaluate the documentary evidence and apply s.12A for itself and afresh. It was common ground that the Court should do so having considered all the evidence and having heard all the submissions. One reason was this. The Judgment recorded that Counsel who appeared for the Respondent before the Judge (Mr Allen), had conceded that the ExAW and Further Information paragraphs (3) and (4) satisfied the first stage question ("reasonable grounds for believing") as to whether at least one of the Relevant Decisions had not been made (Judgment §61: §14 below). No such concession is made by Ms Bostock on this appeal. Ms Collins submits that the concession was correctly made, but she does not submit that it binds the Respondent for the purposes of this appeal.

What the Judge Decided

14. It was common ground before me that the Judge found against the Appellant by reference to both (a) the Relevant Decisions and in any event (b) the Permitted Excuse. The Judge said (Judgment §63: §15 below) that he accepted the submissions of Counsel for the Respondent (identified in the Judgment as "the JA"). The Judge had summarised those submissions as follows (Judgment §§61-62):

> ***61. On behalf of the JA, Mr Allen … submits that the EAW contains a clear statement: "the initial investigation is still pending, the investigating authority wishes to interview Kalman Nemeth as a suspect; therefore, a domestic arrest warrant was issued against him on 18 November 2016, besides continuing the investigation. It is probable that Kalman Nemeth is currently residing outside Hungary, in the United Kingdom". Mr Allen conceded Miss Collins's point that the EAW was issued as part of an investigation. He accepts that paragraphs (3) and (4) of the JA's Further Information demonstrate that there are "reasonable grounds for believing" that at least one of the relevant decisions (required under the statutory framework) had not been made by the requesting authorities. However, he submitted that that is not the end of the matter, because it is for the RP to show reasonable grounds for believing his absence from the territory of the JA is not the sole reason for that failure … He submitted that it was equally clear that the reason for the lack of such decision-making was because the RP could not be found, albeit there had been searches for him.***
>
> ***62. The RP's evidence was that he left Hungary one or two days before the offence date, which I have rejected as inconsistent with an earlier position that he had left exactly 5 days later. He clearly settled in the UK in very close proximity to the time the offence was committed, and he has not returned to Hungary. Mr Allen submitted that, taken in that context, it was clear from the JA's information that the RP was to be progressed as a defendant. But for his absence, the RP would clearly have been interrogated, and there was no other reason he was not. Mr Allen submitted that the RP's argument does not pass the first stage …***

15. The Judge's reasoned conclusions (Judgment §§63-64) were as follows:

> ***63. I accept Mr Allen's submissions, and I find that the RP has not shown reasonable grounds for believing his absence from the territory of the JA is not the sole reason for that failure. Indeed, I do not consider that any evidence demonstrates that. Instead, I consider that his absence is the sole reason for that failure. It appears to me that the EAW, taken together with the JA's further information, reflects reasonable grounds for believing that the JA has made a decision to charge and/or to try the RP, although it would have been helpful if the JA's answers to the CPS IJ unit's questions had been clearer. Miss Collins accepted in her closing submissions that there appeared to be an informal decision to charge.***
>
> ***64. I take account of the fact that the EAW commences with a declaration at the top of the first page: "This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution...[or sentence]". Paragraph (1) of the further information includes: "Based on the viewpoint of the district prosecutor's office carrying out the supervision of the investigation, there is enough evidence to establish that the criminal offence included in the European arrest warrant had been committed by Kalman Nemeth, with special regard to the available surveillance camera recordings of the commission of the criminal offence and the perpetrators' escape route as well as the result of the presentation for identification. " If I am wrong in my assessment, the bar fails in any event due to my findings at the start of the preceding paragraph about the RP's absence. I note the further information includes details about the fact that the RP was absent and about the JA's repeated efforts to find him during the investigation, including visiting his known residences in Hungary, contacting his family and trawling national databases.***

16. I make the following observations. (1) Mr Allen's submissions (Judgment §§61-62) were squarely based on the Permitted Excuse, which is what the Judge accepted (first half of §63; second half of §64). (2) As to that, there is force in Ms Collins's submission that Mr Allen's arguments (§62) focused on the proximity of the index alleged offence to the Appellant's coming to the UK, but logically it does not follow from that feature that the Permitted Excuse is applicable. (3) The Judge also found against the Appellant in relation to the Relevant Decisions (second half of §63; first half of §64). However, his key reasoning (Judgment §63: "the EAW, taken together with the JA's further information, reflects reasonable grounds for believing that the JA has made a decision to charge and/or to try the RP") misaligns, as expressed, with s.12A. The Judge could only find against the requested person in relation to the Relevant Decisions, at the first stage, if it appeared to him that there were no reasonable grounds for believing that the JA had failed to make a decision to charge or to try the RP. Whether, as the Judge expressed it (§63), there were reasonable grounds for believing that one (or for that matter both) of the Relevant Decisions had been taken was not the statutory question and could not suffice. Ms Bostock says this was expression rather than substance. But it is a further reason why, agreeing with both Counsel, it is right that I should simply evaluate the s.12A arguments and materials objectively and afresh.

The Argument

17. Ms Collins submits, in essence, as follows:

i) Regarding the Relevant Decisions, I should conclude: (a) that it appears to me that there are reasonable grounds for believing that the competent Hungarian authorities have not made a decision to charge or have not made a decision to try the Appellant; and (b) that the Respondent has not proved to the criminal standard that the authorities have made both Relevant Decisions. The ExAW refers to an ongoing "investigation": an investigation "to now"; "still pending"; and "continuing". It records the "investigating authority" as having taken the position that it "wishes" to "interview" the Appellant "as a suspect". Turning to the Further Information, Questions (1) and (3) were straightforwardly asked. It would be easy to answer them straightforwardly, if the Relevant Decisions had indeed been taken. There is no such straightforward affirmative answer to Question (1) or (3). Moreover, throughout the Further Information there are references to "the investigation" and "the investigating authority" as well as the description of the next stage of a "suspect interrogation" – where the word is "suspect" – which the "investigating" authority "wished" to undertake. Furthermore, the description of an assessment of evidential sufficiency is as a "viewpoint"; but not as a "decision". There is the reference to "a court procedure", where the Appellant is "declared as the defendant", as being a future step not yet taken: this is not "trial in absence", but describes prior steps.

ii) Regarding the Permitted Excuse, I should conclude: (a) that it appears to me that there are reasonable grounds for believing that there is a failure to take a Relevant Decision to which the Permitted Excuse does not apply; and (b) that the Respondent has not proved to the criminal standard that the Permitted Excuse does apply to any failure. The Respondent in the Further Information at paragraph (4) has acknowledged that "the conditions of holding a procedure

> with absence are met" but has decided not to proceed in that way, because of the "wish" first to undertake the "suspect interrogation". The "court procedure" which could be "conducted in his absence" will be the procedure involving the Relevant Decision or Decisions which the authorities have so far "failed" to take. On that basis, there is a straightforward logic, as follows. Once it is acknowledged that the Respondent could – and has chosen not to – proceed "in his absence" (Further Information paragraph (3)) the "conditions" for doing so being met (Further Information paragraph (4)), it must follow that his "absence" cannot be the "sole reason" for not proceeding to make the Relevant Decision or Decisions. Those are available steps, which have not been taken, notwithstanding his absence. There must be something else – some other reason – beyond the fact of his absence, which has contributed to why they have not been taken.

Discussion

18. I am not able to accept these submissions. In my judgment, it is clear on the evidence that both Relevant Decisions have been taken. I am left with no reasonable grounds for believing that either of them has not been taken. I am left satisfied that the Respondent has proved to the criminal standard that both Relevant Decisions have been taken. That is fatal to the appeal. But further and in any event, even if I am wrong about that and to the extent that a Relevant Decision has not been taken, I am satisfied that the Permitted Excuse applies. I am left with no reasonable grounds for believing that the Appellant's absence from the territory was not the sole reason for any such failure. I am left satisfied that the Respondent has proved to the criminal standard that any failure was down to the Appellant's absence from the territory of Hungary as the sole reason for the failure. That too, independently, is fatal to the appeal.

19. In my judgment, the picture is clear. A criminal procedure was initiated (Further Information paragraph (12)). There has been an investigation, supervised by the district prosecutor's office (paragraph (1)). The district prosecutor's office has reached an assessment of evidential sufficiency: a viewpoint that there is a sufficiency of evidence to establish that the Appellant has committed the criminal offence (paragraph (1)). That evidence, assessed as sufficient to establish his having committed that offence, is CCTV and identification evidence (paragraph (1)). No "special formal decision" stood to be "delivered" or "passed" (paragraph (2)): the "decision" is not a "special formal" one; it did not need to be "delivered" or "passed". The "conditions" – that is, all conditions – are now "met" for "holding a procedure in absence" (paragraph (4)). That is a "court procedure … conducted in his absence", with the Appellant as "defendant" (paragraph (3)). That is a "procedure with absence", which will ensue if the Appellant is not "caught within a reasonable period" (paragraph (4)). Straightforwardly, this is a description of a trial in absence. The Hungarian authorities have decided – before proceeding to the trial – that they wanted ("wished") to conduct "a suspect interrogation" (paragraph (4)). That is not for the purpose of gathering evidence against the Appellant (described in paragraph (1)). Rather, it is to "provide an opportunity" to "file a defence on the merits", and "to name his accomplice" (paragraph (4)). The impediment to proceeding – and the sole impediment identified – is the Appellant's absence. The authorities were unable to

"find" him, and "so the suspect interrogation could not be held" (paragraph (5)), with his absence constituting "the objective reasons" (paragraph (11)).

20. This information, in my judgment, clearly shows both crystallised intention and concrete decision to accuse the Appellant of the crime, and to take him to trial. Choosing to have an interrogation to give him a chance to put a defence, and to see if he will name an accomplice, in no way conflicts with this. Nor does preferring to have him present in Hungary, for a trial in presence. But even if a decision has yet to be taken, it is squarely because of his absence; and nothing else.

Preferring a 'Trial in Presence'

21. One feature of the present case is that (a) a 'trial in absence' is possible (Further Information paragraph (4)) and yet (b) the case has not been progressed to trial (paragraph (3)). Is the logic of this that the Appellant's absence cannot be "the sole reason" for a failure to proceed? The answer, in my judgment, is as follows. Whether to proceed to trial in the absence of an accused is an option familiar to the criminal procedure, within the cosmopolitan world of s.12A. 'Trial in absence' may, for obviously legitimate reasons, be treated as a last resort. The competent prosecuting authorities of a state may legitimately decide that they wish to proceed to a 'trial in presence'. Such a stance must be respected, and factored in. In such a case, where everything else is in place, and the authorities cannot then proceed with the identified trial, the ongoing absence is – straightforwardly – the "sole reason". By the same token, if in such a properly preferred situation the decision to try is itself awaited, the absence is still the "sole reason".

22. This was addressed in the case of "FS", one of the requested persons in Puceviciene. There, a legitimate choice had been made to have a 'trial in presence', even though there could have been a 'trial in absence' (§205ii). Insofar as a Relevant Decision had not been taken (§208), the Court explained (§§209, 211):

> ***It is perfectly clear that, if we were to conclude that no decision to try had been taken, it could only be because the prosecutor is unable to take it while FS is absent from the Czech Republic, because the prosecutor considers that he needs to be interrogated there…***
>
> ***FS submitted that, because the Czech Republic countenanced trial in absentia, his absence could not be the sole reason why no decision to try had been taken. Thus approached, s.12A would bar the extradition of fugitive and non-fugitive accused alike where the requesting state permitted trial in absentia… It would be an error of some magnitude to construe any part of the Act so that absence from the state seeking extradition, whether as a fugitive or not, barred extradition for trial where the requesting state permitted trials in the absence of the accused.***

A Purpose Cross-Check

23. Section 12A is applicable according to its terms, interpreted in light of its purpose (§6i above). I cannot put the section to one side, and instead apply the purpose, disregarding the specific terms of the section which operate to guarantee its delivery. However, it is a comforting 'cross-check' to record – as I do – that no part of the purpose is undermined by the outcome on the facts of the present case.

'Working Illustration'

24. It is frequently said that extradition advocates should stick to a few key authorities which authoritatively identify relevant principles. It is sometimes suggested that cases constituting fact-specific applications cannot assist a Court. I think there is room for a view that focused deployment of 'working illustration' cases – provided always that the cases are not misrepresented as authoritative precedent – may serve to help build judicial confidence in applying extradition's fact-sensitive legal standards. Indeed, sometimes, a leading case both (a) authoritatively states legal principles and (b) provides a practical 'working illustration' of the application of those principles. The well-known Article 8 case of HH v Italy [2012] UKSC 25 [2013] 1 AC 338 is an example. The s.12A case of Puceviciene is another.

25. In Puceviciene, the Court addressed the legal principles (§§3-81). Having said this was all "highly fact-sensitive" (§57), the Court then deliberately addressed in considerable detail, the position in the three instant cases: VP (§§83-113); AC (§§114-133); FS (§§134-213). It said this was "illustrative", specifically as to concerns arising out of questions about mutual assistance (§83). Proceeding with the caution which reflects the intensely fact-specific nature of any illustration, and the importance of the combination of all features, I observe as follows. In AC's case (§114) the use of the words "suspect" and "investigations" and intending the requested person "being questioned as a suspect" (§§116, 118) did not support the Relevant Doubt about the making of the Relevant Decisions (§128). As to the Permitted Excuse, insofar as a Relevant Decision had not been taken, the prosecutor's reason was clearly that AC's absence from the territory was the reason why there had been no indictment (§131). And in FS's case (§134), there was an assessment of evidential sufficiency (§159iv), a description of an intended future interrogation as an accused (§159iii, vi), and an acknowledgment that the conditions were met to proceed to trial in absence (§160). None of these supported the Relevant Doubt about the making of the Relevant Decisions (§205ii-vii). Again, insofar as a Relevant Decision had not been taken, this was clearly because of absence from the territory (§208). Repeating that cases turn on their particular factual circumstances, in the round, this exercise has been reassuring.

Conclusion

26. For these reasons and in all the circumstances, having evaluated the position afresh, the s.12A arguments fail. The Judge was correct. The appeal is dismissed.