Neutral Citation Number: [2018] EWHC 218 (Admin)

Case No: CO/2697/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2018

Before :

LORD JUSTICE TREACY

and

MR JUSTICE MALES

- -

Between :

ATTILA IMRE	**Appellant**
- and -	
DISTRICT COURT IN SZOLNOK (HUNGARY)	**Respondent**

- -
- -

MARK SUMMERS QC and JAKE TAYLOR (instructed by **Birds, solicitors**) for the **Appellant**
BENJAMIN SEIFERT (instructed by **CPS Extradition Unit**) for the **Respondent**

Hearing date: 6 February 2018

- -

Judgment Approved by the court

Mr Justice Males :

Introduction

1. This is an appeal by the appellant, Attila Imre, against the decision by DJ Coleman dated 2 June 2017 by which she decided that the European Arrest Warrant seeking the extradition of the appellant to Hungary was valid and ordered his extradition.

2. I shall have to trace the way in which the arguments have developed as further information has been provided by the requesting court. The appeal arises, however, as a result of the fact that the appellant was convicted in his absence by the District Court in Szolnok in Hungary after issue of the EAW, although his conviction is subject to appeal. In the light of this development it is submitted on his behalf that although the EAW was when issued an accusation warrant, (1) the appellant must now be treated as a person convicted in his absence for the purpose of deciding whether he should be extradited, (2) the EAW is invalid because it does not contain the information required in a conviction case, and (3) his extradition is barred by section 20 of the Extradition Act 2003.

Factual background

3. By an EAW issued on 27 November 2015 and certified on 9 March 2016 the extradition of the appellant to Hungary is sought in relation to an allegation that he blackmailed Erzsebet Erdos on 29 and 30 August 2013 in Szolnok, Hungary. The appellant's evidence is that he came to this country in or about November 2014 and has worked here in the catering trade.

4. As at the date of the EAW the appellant was accused of this offence but had not been convicted.

5. However, following a request for further information, the District Court in Hungary set out further information in a letter dated 10 April 2017 as follows:

   (1) The offence was committed on 30 August 2013.

   (2) The appellant was informed about the commencement of the criminal procedure on the same date during what was described as a "hearing as a suspect". It appears from other evidence that this refers to the appellant being questioned by the police.

   (3) The District Court issued an indictment on 29 November 2013 and posted it to the appellant, but the postal consignment was returned by the Post Office on 17 December 2013 with the remark "The addressee did not seek the consignment".

   (4) The appellant's representative received a summons for his trial on 21 July 2014. It was later clarified that this "representative" was a lawyer appointed to act for the appellant, who was appointed (but not by the appellant himself) on the day of the appellant's questioning by the police.

   (5) The appellant's trial was due to take place on 15 September 2014. He was not present, despite having been properly summoned in accordance with Hungarian law by notification to his legal representative. The court ordered that he attend a further hearing on 10 November 2014.

   (6) However, on 10 November 2014 the Szolnok police stated that the appellant was not present at his known place of domicile.

(7) On 6 January 2015 the appellant requested the withdrawal of a warrant for his arrest and announced that the summons should be sent to his place of domicile in Szolnok. He said that he was not living at that address but authorised his sibling to receive on his behalf postal consignments addressed to him. He did not give the address where he was living (which was in fact in the United Kingdom).

(8) On 9 January 2015 the court called on the appellant to announce his place of residence. However, on 29 January 2015 he wrote to say that he was not able to provide a new place of residence and requested that the summons be served to his registered place of residence.

(9) There was a further hearing of the appellant's trial on 23 March 2015. Once again he did not appear, although his legal representative had received the summons.

(10) On 6 April 2015 the police stated that they could not establish any other place of residence for the appellant.

(11) At a hearing over a year later, on 14 October 2016, the District Court heard evidence from three prosecution witnesses. The appellant was not present.

(12) In a judgment pronounced on the same day the appellant was found guilty and sentenced to imprisonment for two years and four months.

(13) The District Court also ordered the activation of a suspended sentence of imprisonment previously ordered for a different offence. This was for a period of one year and six months.

(14) The judgment of the District Court has been appealed by the appellant's appointed counsel and the procedure is currently at the appeal court.

6. The appellant's extradition hearing was due to take place on 13 April 2017 but was adjourned in the light of this further information in order to give the Hungarian authorities an opportunity to clarify the status of the EAW. However, no further information was provided before the adjourned hearing before the District Judge.

7. The District Judge expressly accepted the further information set out above as "completely reliable". She found also, rejecting the appellant's evidence, that he had decided to leave Hungary without complying with his obligation to notify the authorities there of his change of address and that, by failing to provide a new address, he made it impossible for the authorities to find him. She was satisfied that the appellant was a fugitive from justice who had been aware of the proceedings in Hungary at all times and that the court in Hungary had eventually no choice but to proceed to a trial in his absence.

The judgment of the District Judge

8. The appellant's principal argument before the District Judge was that because the EAW was an accusation warrant and the appellant was now a convicted person, the requirements of section 2 of the 2003 Act were not satisfied. The EAW was therefore invalid.

9. The District Judge was satisfied that the warrant was an accusation warrant which was valid at the date of its issue and continued to be valid as an accusation warrant notwithstanding the appellant's subsequent conviction in Hungary. She reached this conclusion applying the decision of the House of Lords in *Caldarelli v Judge for*

Preliminary Investigations of the Court of Naples, Italy [2008] UKHL 51, [2008] 1 WLR 1724, stating:

> "The RP was convicted but has appealed that conviction. As the 'trial' is a continuing process which has not been finally concluded the RP remains an accused person."

10. Alternatively, she held, applying the decision of the Supreme Court in *Zakrzewski v District Court in Torun, Poland* [2013] UKSC 2, [2013] 1 WLR 324, that the EAW was valid at the date when it was issued and that its validity could not be challenged by reference to subsequent events.

11. She rejected the appellant's secondary argument that the proceedings constituted an abuse of process, saying that the appellant was a fugitive who was aware of the prosecution in Hungary throughout.

The grounds of appeal

12. In grounds of appeal and in a skeleton argument submitted for the present hearing, Mr Mark Summers QC and Mr Jake Taylor submitted that (1) *Caldarelli* does not establish any principle of law that a person remains "accused" and not "convicted" for the purpose of extradition law until any process of appeal is finally concluded; (2) if the appellant is (as he contends) now a convicted person, the EAW is invalid because it does not contain the matters required by section 2(5) and (6) of the 2003 Act; (3) even if the invalidity of the EAW could be remedied, extradition ought to have been made conditional upon a guarantee of a retrial pursuant to section 20 of the Act; and (4) even if the appellant remains an "accused" person, the EAW is nonetheless factually and legally misleading and the proceedings are an abuse of process. However, these submissions have to some extent been overtaken by events.

The further information dated 30 January 2018

13. In a letter dated 25 January 2018 the Crown Prosecution Service posed further questions to the District Court in Szolnok which provided its answers in a letter dated 30 January 2018. The District Court explained that there is as yet no judgment in the appeal proceedings which are continuing and that the criminal proceedings therefore have not yet been finally completed. It explained in paragraph 2 of the letter that the course which the appeal will take depends upon whether the appellant is extradited:

> "If the extradition proceeding is successful, the appellate court will set a trial, and the accused will be heard during the trial, and if necessary, further evidence, as moved by the accused, will be taken."

14. In response to a direct question whether the appellant is "accused or convicted", the District Court replied that he "is currently accused."

15. The District Court explained also that the counsel referred to in its letter dated 10 January 2017 had been appointed by the court to act for the appellant.

16. The information contained in the letters dated 10 April 2017 and 30 January 2018 comprises additional information provided in accordance with Article 15 of the Framework Decision of 2002 (Council Framework Decision 2002/584/JHA) as amended by the further Framework Decision of 2009 (2009/299/JHA). Such further information from the requesting court is admissible on an appeal to this court under section 26 of the Extradition Act 2003 and will be admitted where the interests of justice so require: *Straszewski v District Court in Bydogszcz, Poland* [2017] EWHC 844 (Admin) at [30] to

[36]; *FK v Stuttgart State Prosecutor's Office, Germany* [2017] EWHC 2160 (Admin) at [19] to [51].

17. Realistically, Mr Summers for the appellant accepted that we should admit the letter dated 30 January 2018, despite the late stage at which this information was sought. He acknowledged also that it changed the scope of the appeal.

The issues on appeal reformulated

18. In the light of the further information received from the District Court, Mr Summers reformulated his submissions (in summary) as follows:

    (1) The further information shows that (a) the appellant has been convicted in his absence at first instance by a court in the requesting state; and (b) although he has a right of appeal, the appeal will not involve a full examination of the facts and the law and (in particular) will not afford the appellant an opportunity to test the prosecution evidence which was adduced at the trial in October 2016.

    (2) Accordingly, applying the decision of the CJEU in the case of *Tadas Tupikas* (Case C-270/17 PPU decided on 10 August 2017), the decision at first instance must be regarded as the final decision determining the appellant's guilt.

    (3) As a result the appellant is now a convicted person.

    (4) The EAW read with the further information is defective and invalid because (a) it does not set out the facts found by the convicting court and (b) it does not identify the order which forms the basis for the appellant's proposed detention.

    (5) As a person convicted in his absence, the appellant is entitled to the protections afforded by section 20 of the 2003 Act, including the right to a full retrial; but the further information shows that his appeal does not amount to such a retrial.

    (6) Alternatively, even if the appellant remains an accused person, it would be contrary to his rights under Article 6 of the ECHR to extradite him in circumstances where an appeal will not involve a full examination of the facts and the law; accordingly his extradition is barred by section 21A of the Act.

19. Mr Benjamin Seifert for the respondent challenged each of these submissions, contending in particular that the appellant remains an accused person and that it is not for this court to enquire into the nature of the appellant's appeal in the requesting state, which is itself under an obligation to protect the appellant's Article 6 rights; and that it is to be presumed that the requesting court will comply with that obligation.

The legal framework

20. Before addressing these submissions it is necessary to say something about the different regimes which apply to accusation and conviction warrants and to explain the role of further information provided by the requesting state.

Accusation and conviction warrants – the 2003 Act

21. There is a long-standing distinction in English law between an accusation warrant and a conviction warrant. In *R (Guisto) v Governor of Brixton Prison* [2003] UKHL 19, [2004] 1 AC 101, a case decided under the Extradition Act 1989, it was held that a person could not be extradited as a convicted person on a warrant describing him as an accused person.

22. That distinction is carried over into Part 1 of the Extradition Act 2003 (I refer to the provisions of the Act as subsequently amended) which gives effect to the 2002 Framework Decision as amended in 2009. As has been repeatedly affirmed, wherever possible the 2003 Act will be interpreted consistently with the Framework Decision: *Caldarelli* at [22]; *Cretu v Local Court of Suceava, Romania* [2016] EWHC 353 (Admin), [2016] 1 WLR 3344 at [18]; *Goluchowski v District Court in Elblag, Poland* [2016] UKSC 36, [2016] 1 WLR 2665 at [4(vi)]; and *Alexander v Public Prosecutor's Office, Marseille District Court of First Instance, France* [2017] EWHC 1392 (Admin), [2017] 3 WLR 1427 at [62].

23. The statements and information which an EAW is required to contain are different in the case of an accusation warrant and a conviction warrant, as are the matters which the court is required to consider before ordering the extradition of a requested person. It is therefore important to know whether an EAW is an accusation warrant or a conviction warrant. The distinction between the two has been described as "important" and "significant", notwithstanding that the Framework Decision "deals with accusation and conviction cases together": *Goluchowski* at [5] and [9].

24. Thus section 2 of the 2003 Act provides:

> "(1) This section applies if the designated authority receives a Part 1 warrant in respect of a person.
>
> (2) A Part 1 warrant is an arrest warrant which is issued by a judicial authority of a category 1 territory and which contains—
>
> > (a) the statement referred to in subsection (3) and the information referred to in subsection (4), or
> >
> > (b) the statement referred to in subsection (5) and the information referred to in subsection (6).
>
> (3) The statement is one that—
>
> > (a) the person in respect of whom the Part 1 warrant is issued is accused in the category 1 territory of the commission of an offence specified in the warrant, and
> >
> > (b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being prosecuted for the offence.
>
> (4) The information is—
>
> > (a) particulars of the person's identity;
> >
> > (b) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;
> >
> > (c) particulars of the circumstances in which the person is alleged to have committed the offence, including the conduct alleged to constitute the offence, the time and place at which he is alleged to have committed the offence and any provision of the law of the category 1 territory under which the conduct is alleged to constitute an offence;
> >
> > (d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence if the person is convicted of it.

(5) The statement is one that—

(a) the person in respect of whom the Part 1 warrant is issued has been convicted of an offence specified in the warrant by a court in the category 1 territory, and

(b) the Part 1 warrant is issued with a view to his arrest and extradition to the category 1 territory for the purpose of being sentenced for the offence or of serving a sentence of imprisonment or another form of detention imposed in respect of the offence.

(6) The information is—

(a) particulars of the person's identity;

(b) particulars of the conviction;

(c) particulars of any other warrant issued in the category 1 territory for the person's arrest in respect of the offence;

(d) particulars of the sentence which may be imposed under the law of the category 1 territory in respect of the offence, if the person has not been sentenced for the offence;

(e) particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offence, if the person has been sentenced for the offence."

25. Section 11 of the Act sets out various bars to extradition which may require the requested person to be discharged. Most of those bars apply equally to accusation and conviction warrants, but two of them ("absence of prosecution decision" and "forum") apply only in the former case. If none of the bars to extradition apply, the course which the court is then required to take differs according to whether the EAW is an accusation or a conviction warrant. Thus subsection (4) provides that in a conviction case, the court must proceed under section 20, while subsection (5) provides that in an accusation case the court must proceed under section 21A.

26. Section 20, which applies to conviction warrants, sets out a series of questions which the court must consider. These are (1) whether the person was convicted in his presence (subsection (1)); (2) whether the person deliberately absented himself from his trial (subsection (3)); and (3) whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial (subsection (5)). In the event of an affirmative answer to any of these questions, the court must proceed under section 21. If they are all answered in the negative, the court must order the requested person's discharge. If the court is required by its answers to these questions to proceed under section 21, it must decide whether the person's extradition would be compatible with his Convention rights within the meaning of the Human Rights Act 1998.

27. The questions which the court is required to consider in the case of an accusation warrant are different. These are set out in section 21A and are limited to whether the requested person's extradition would be compatible with his Convention rights and whether his extradition would be "disproportionate", for which latter purpose only the particular matters specified in subsection (3) may be taken into account.

Accusation and conviction warrants – the Framework Decision

28. In contrast, as Lord Mance pointed out in *Goluchowski* at [9], the Framework Decision deals with accusation and conviction cases together. Article 1(1) provides:

> "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."

29. Article 8(1) sets out the required form and content of an EAW:

> "The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex: (a) the identity and nationality of the requested person; (b) the name, address, telephone and fax numbers and email address of the issuing judicial authority; (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of articles 1 and 2; (d) the nature and legal classification of the offence, particularly in respect of article 2; (e) a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person; (f) the penalty imposed, if there is a final judgment, or the prescribed scale of penalties for the offence under the law of the issuing member state; (g) if possible, other consequences of the offence."

30. Lord Mance commented at [23] of his judgment in *Goluchowski* that:

> "Underlying the provisions of section 2(4) and 2(6) of the 2003 Act are the requirements of article 8(1)(c) of the Framework decision. Article 8(1) draws no explicit distinction between accusation and conviction cases, but embraces both. The declared purpose of article 8(1)(c) is to ensure that the EAW demonstrates that the case falls within articles 1 and 2, that is to say that it shows that the case is either an accusation or a conviction case (article 1(1)) and that the offence qualifies under article 2."

Provision of further information by the requesting state

31. Article 15 of the Framework Decision deals with the sufficiency of the information provided by the requesting state and the provision of further information:

> "(1) The executing judicial authority shall decide, within the time limits and under the conditions defined in this Framework Decision, whether the person is to be surrendered.
>
> (2) If the executing judicial authority finds the information communicated by the issuing member state to be insufficient to allow it to decide on surrender, it shall request that the necessary supplementary information, in particular with respect to articles 3 to 5 and article 8, be furnished as a matter of urgency and may fix a time limit for the receipt thereof, taking into account the need to observe the time limits set in article 17.
>
> (3) The issuing judicial authority may at any time forward any additional useful information to the executing judicial authority."

32. There is no limit in Article 15 to the further information which can be provided, provided that it is "useful".

33. Such additional information may be received in evidence if it is duly authenticated: section 202 of the 2003 Act.

34. Lord Mance observed in *Goluchowski* that further information obtained under Article 15 might show that an EAW which was incomplete on its face was after all valid and enforceable or, on the other hand, might undermine what was said in the EAW itself:

> "40. In the light of the *Bog-Dogi* case [Case C-241/15, [2016] 1 WLR 4583], it is therefore clear under European Union law that, if information obtained under article 15 subsequently to the EAW shows that a European arrest warrant was in fact based on an 'enforceable judgment' or equivalent judicial decision, even though this was not fully or accurately 'evidenced' on its face, the EAW will be valid and enforceable. On the other hand, if subsequently obtained information undermines in a fundamental respect a statement in an EAW which on its face evidences an enforceable judgment or equivalent judicial decision, it could not be right to give effect to the EAW willy nilly."

35. *Alexander* raised directly the question whether further information under Article 15 can validate or cure a defect in an accusation EAW in circumstances where the EAW lacks some of the particulars required by section 2 of the 2003 Act. Irwin LJ giving the judgment of the court referred to the United Kingdom having opted back into the Framework Decision in 2014. His conclusion in the light of this was that:

> "73. In the event, we conclude that the previous approach to the requirements of an EAW and the role of further information must be taken no longer to apply. The formality of Lord Hope's approach in *Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, based on the wording of the Act, has not survived. It is clearly open to a requesting judicial authority to add missing information to a deficient EAW so as to establish the validity of the warrant.
>
> 74. … The effect of the two key recent decisions [*Bog-Dogi* and *Goluchowski*] is, we conclude, that missing required matters may be supplied by way of further information and so provide a lawful basis for extradition."

36. This decision was challenged in *Kirsanov v Viru County Court, Estonia* [2017] EWHC 2593 (Admin), but was confirmed by this court.

37. It follows that when further information is provided pursuant to Article 15, the EAW and the further information must be read together.

Reading the EAW and the further information together

38. The EAW in the present case (Warrant no. 5.B.1158/2013/46 of the District Court of Szolnok) began with the introductory words contemplated by Article 1(1) of the Framework Decision:

> "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."

39. So far, therefore, it did not make clear whether it was intended to be an accusation warrant or a conviction warrant. However, it went on in box (c) to explain that the maximum custodial sentence which might be imposed was five years and left blank the section where details could be given of the length of sentence which had in fact been imposed, with the remaining sentence to be served. It follows that no sentence had yet

been imposed. Box (d), which requires information about the presence or otherwise of the requested person at his trial, was left blank, indicating that no trial had yet taken place. Box (e), where information about the offence is to be set out, stated that "there is well-substantiated suspicion to accuse Attila Imre of having committed" the offence of blackmail, details of which were set out. Box (f) indicated that prescription would apply as of 27 November 2020, so that a prosecution would be barred after that date.

40. It is clear from this, and not disputed, that the EAW was when issued an accusation warrant for the purpose of the 2003 Act. At that time the appellant was accused but not yet convicted.

41. It is equally clear, and again not disputed, that the court is entitled to have regard to the facts disclosed by the further information provided by the requesting court in its letters dated 10 April 2017 (which was before the District Judge) and 30 January 2018 (which was not). This follows from what was said in the Supreme Court in *Goluchowski* and the decisions of this court in *Alexander* and *Kirsanov*, cited above.

42. It is, however, worth explaining that *Zakrzewski*, on which the District Judge relied, does not stand in the way of this approach. She treated *Zakrzewski* as holding that the validity of the EAW cannot be challenged by reference to subsequent events. However, what was said in *Zakrzewski* about the inadmissibility of such a challenge referred to a challenge based on "extraneous evidence". Thus Lord Sumption said at [8]:

> "It follows that the scheme of the Framework Decision and of Part 1 of the 2003 Act is that as a general rule the court of the executing state is bound to take the statements and information in the warrant at face value. The validity of the warrant depends on whether the prescribed particulars are to be found in it, and not on whether they are correct. It cannot be open to a defendant to challenge the validity of a warrant which contains the prescribed particulars by reference to extraneous evidence tending to show that those statements and information are wrong. If this is true of statements and information in a warrant which were wrong at the time of issue, it must necessarily be true of statements which were correct at the time of issue but ceased to be correct as a result of subsequent events. Validity is not a transient state. A warrant is either valid or not. It cannot change from one to the other over time."

43. Further information provided pursuant to Article 15 of the Framework Decision is not in any way to be regarded as "extraneous evidence". On the contrary, the provision of such information is intrinsic to the scheme of mutual trust between states which are party to the Framework Decision, as Lord Sumption made clear at [10] of his judgment. If further information provided pursuant to Article 15 were to show that the EAW had been issued on a mistaken basis or was no longer correct, the court would not be required to ignore those facts.

44. It is possible, therefore, that further information provided by the requesting state may show that a requested person who was accused at the date of the EAW has subsequently become convicted as a result of a decision in the requesting state. The principal issue in the present case is whether that is what the further information now before the court does show.

Is the appellant accused or convicted?

45. *Caldarelli* demonstrates that the conviction by a court of first instance does not necessarily render the requested person "convicted" for the purpose of the Framework

Decision and the Extradition Act 2003. In that case there was evidence of Italian law and practice to the effect that under Italian law the first instance conviction and sentence were neither final nor enforceable until the criminal appeal process was concluded and that a defendant is not regarded as "convicted" under Italian law until his conviction becomes final at the conclusion of the appeal process: see the summary at [3] of the judgment of Lord Bingham. This was expressly contrasted with the usual position under English law, whereby a person is regarded as convicted and any sentence takes immediate effect once the trial in the Crown Court or Magistrates' Court is concluded, notwithstanding the existence of an appeal: see [24] *per* Lord Bingham, [30] *per* Lady Hale, and [34] and [37] *per* Lord Carswell. It appears that, in this respect, Italy is not unique. Lord Mance commented at [31] of his judgment in *Goluchowski* that it is "a common continental practice (in contrast with normal British practice)" that a sentence only becomes final and enforceable at the conclusion of any appeal.

46. It was because of the evidence of Italian law that the House of Lords held that the extradition of the requested person was properly sought as an accused person and not as a convicted person. His status as an accused person was not affected by his conviction before the first instance court because that conviction and the resulting sentence were not final or enforceable.

47. In the present case there was no evidence before the District Judge about the effect in Hungarian law of an appeal against the appellant's first instance conviction. It may be, as suggested in the appellant's initial grounds of appeal, that the District Judge was mistaken to regard *Caldarelli* as deciding that an appeal means that a requested person remains accused as distinct from convicted even in the absence of evidence of the law and procedure of the requesting state. However, we need not decide that point because there is now information before the court which explains the position. The information in the letter dated 30 January 2018 states expressly that so far as the District Court in Szolnok is concerned, the appellant remains an accused person. I see no reason why we should not treat this as an accurate statement of the position in Hungarian law.

48. The question then arises whether, despite this, the nature of the appellate process in Hungary is such that it would be contrary to the requirements of the Framework Decision to regard the appellant as still accused and not convicted. It is here that Mr Summers submits that (a) on the facts, the appeal will not be a full re-hearing and (in particular) will not afford the appellant an opportunity to test the prosecution evidence adduced at the trial in October 2016 and (b) as a matter of law, relying on *Tupikas*, only if there is to be such a full re-hearing on appeal can a requested person who has been convicted in his absence at first instance be regarded as being accused and not convicted for the purpose of the Framework Decision (and therefore the 2003 Act).

The nature of the appeal process in Hungary

49. It is therefore necessary to consider what the further information provided by the District Court in its letter dated 30 January 2018 says about the nature of the appeal process available to the appellant in Hungary. For convenience I set this out again:

> "If the extradition proceeding is successful, the appellate court will set a trial, and the accused will be heard during the trial, and if necessary, further evidence, as moved by the accused, will be taken."

50. Mr Summers submits that this falls short of a full examination of the facts because it would be limited to allowing the appellant to be heard and to adduce further evidence if

he wishes to do so and does not allow for testing by or on behalf of the appellant of the prosecution witnesses whose evidence was heard at the first instance hearing on 16 October 2016. This is the premise from which all or almost all of his legal submissions followed.

51. However, I do not accept this reading of the further information provided by the District Court. It is not what it says. As I read the information, there will be a full trial in the appellate court ("the appellate court will set a trial"). There is no reason to suppose that this trial would be in some way limited. It is understandable that the District Court should have gone on to explain that the appellant will be entitled to be heard during the trial and to adduce evidence in his defence. Whether an appellant is entitled to do this when he has not appeared below, particularly if he had the opportunity to appear below and the evidence was available, is a question which often arises. Accordingly the District Court has explained the position. But this does not mean that such evidence is the only new material which will be presented during the trial or that there will be no opportunity to test (if appropriate by cross examination to the extent that this forms part of the Hungarian trial process) the evidence relied on by the prosecution.

52. I would therefore reject the premise which forms the starting point for the appellant's arguments as to why he should be regarded as a convicted person. The result is that many of those arguments simply fall away. However, I will deal with them as briefly as I can.

Tupikas

53. As already indicated, the appellant's argument is that a requested person who has been convicted in his absence at first instance but who has exercised a right of appeal must be regarded as convicted unless the appeal will be a full re-hearing of his case. This is said to be the position in law as a result of the CJEU decision in *Tupikas*.

54. *Tupikas* was a case of an undoubted conviction warrant. The requested person had been convicted in his presence at his first instance trial in Lithuania and his appeal had been dismissed before the issue of the EAW seeking his extradition from the Netherlands. However, the EAW did not say and there was no information whether he had also been present at the appeal hearing. The issues were whether he had been convicted in his absence and, if so, whether he had deliberately absented himself from his trial for the purpose of Article 4a of the Framework Decision (equivalent to the questions posed in the case of a conviction warrant by section 20(1) and (3) of the 2003 Act). As he had been present at the first instance trial, these questions would only arise if the appeal was to be treated as "the trial resulting in the decision" for the purpose of Article 4a.

55. The CJEU held that "the trial resulting in the decision" was the hearing at which the court made a final determination of the requested person's guilt and that, where there was an appeal at which the appeal court had "jurisdiction to re-examine the case, by assessing the merits of the accusation in fact and in law, and thus to determine the guilt or innocence of the person concerned on the basis of the evidence presented", it was the appeal decision which was relevant for the purpose of Article 4a. Accordingly, where the appeal process had those characteristics, presence or absence at the first instance hearing was irrelevant. What mattered was whether the requested person was present at or deliberately absent from the appeal hearing. On the other hand, if the appeal process did not have those characteristics, "the trial resulting in the decision" was the first instance hearing at which the requested person had been present, so that the Article 4a issues did not arise. The CJEU concluded by saying that it was up to the court considering whether to order extradition to satisfy itself that the appeal process had the characteristics in question.

56. Accordingly the case was not concerned at all with whether the requested person should be regarded as convicted or merely accused. There was no doubt that he was convicted. The issue was whether, for the purpose of applying the tests relevant to extradition of a convicted person, the requested court should focus on the first instance or the appeal decision.

57. In my judgment *Tupikas* has little or no bearing on the question we have to decide, which is whether the appellant is to be regarded as convicted or accused. I see nothing in the decision which requires us to disregard the statement in the further information dated 30 January 2018 that according to Hungarian law and procedure, the appellant remains accused.

58. Moreover, in the absence of at least some evidence to the contrary or some real ambiguity in the information provided by the District Court, we are entitled to proceed on the basis that Hungary will comply with its obligation to afford the appellant a fair trial in accordance with Article 6 of the ECHR. Although there may be some occasions when this is unavoidable, it is in general undesirable and contrary to the principle of mutual trust on which the scheme of the Framework Decision depends for the court in the requested state to have to investigate whether the procedure in the requesting state complies with Article 6: *Cretu* at [35] and [36].

Validity of the EAW as a conviction warrant

59. If (contrary to my conclusion) the EAW read with the further information is now to be regarded as a conviction warrant, Mr Summers submits that it is defective and invalid on two grounds. The first is that it does not set out the facts found by the convicting court. What it does is to set out in the EAW itself the allegations against the appellant (there is no suggestion that these are insufficient to render the warrant valid as an accusation warrant) with a statement in the further information that the appellant was convicted by the first instance court. Mr Summers says that is insufficient because it does not explain what facts were found proved by the convicting court.

60. I do not accept this criticism. In *King v Public Prosecutors of Villefranche sur Saone, France* [2015] EWHC 3670 (Admin) this court dealt with the level of particularity needed in a conviction case. Collins J said:

> "21. As Hickinbottom J in my view correctly observed in *Sandi* [2009] EWHC 3079 (Admin), the level of particularity to meet the requirements of s.2(6)(b) will depend on the circumstances of each case. In many, where for example offences were committed wholly within the requesting state and involved acts directed at individual victims, little would be required beyond time, place and that the person did the criminal act which led to conviction.
>
> 22. I do not believe that the particulars required whether for an accusation or a conviction warrant need great detail. As I have said, provided they give sufficient information to enable any available point on a bar to be taken and the ability to judge whether the offence is properly listed in the framework list and dual criminality can be shown if that should be needed, they will suffice whether for accusation or conviction cases."

61. The EAW together with the further information satisfies this requirement.

62. The second ground on which Mr Summers submits that the warrant is defective is that it does not identify the order which forms the basis for the appellant's proposed detention. I

do not accept this. It is clear that the order in question is the order made by the District Court at the hearing on 14 October 2016 (Judgment No. 5B.1158/2013/99).

The section 20 questions

63. Mr Summers' next submission (again on the basis that the appellant should be regarded as convicted) was that as a person convicted in his absence, the appellant is entitled to the protections afforded by section 20 of the 2003 Act. As it is, the questions whether the appellant had "deliberately absented himself from his trial" (section 20(3)) and (if he had not) whether he "would be entitled to a retrial or (on appeal) to a review amounting to a retrial" (section 20(5)) do not arise. If they did, however, the further information now provided makes clear that there is a powerful argument that the appellant did deliberately absent himself from his trial (as the meaning of that phrase was explained in *Cretu* at [34] and *Stryjecki v District Court in Lublin, Poland* [2016] EWHC 3309 (Admin) at [50]). Even if he was not deliberately absent, however, the further information shows that he is entitled to a retrial or the equivalent on his appeal and, as I have said, we are entitled to proceed on the basis that Hungary will comply with its obligation under Article 6 of the ECHR.

64. If they were to arise, therefore, it is evident that the section 20 questions would be answered adversely to the appellant and that his extradition would be ordered.

Section 21A

65. As the EAW was and remains an accusation warrant, the District Judge was required to proceed under section 21A of the 2003 Act. The questions arising under that section are concerned with whether extradition is compatible with the requested person's Convention rights and whether it would be disproportionate. Although there had been a challenge to the appellant's extradition under Article 3 of the ECHR, that point was abandoned at the hearing before the District Judge upon an assurance being provided by the Hungarian authorities that during any period of detention for the specified offence the appellant would be detained in conditions that guarantee at least 3 m² of personal space. There was no argument about proportionality.

66. There does not appear to have been any argument before the District Judge about Article 6 of the ECHR but the conclusions which I have already reached mean that there is no such argument to be had.

Disposal

67. For the reasons given above and in the light of the further information provided by the District Court, I would dismiss the appeal.

Postscript

68. As already noted, having convicted the appellant of the blackmail offence for which his extradition is sought, the District Court also ordered the activation of a suspended sentence of imprisonment previously ordered for a different offence. This was a sentence of imprisonment for one year and six months imposed on 16 August 2013 for an offence of embezzlement by order 11.B.799/2013/2. That sentence fell to be activated if the appellant was sentenced to imprisonment for a crime committed during the two-year probation period (which the blackmail offence was). Accordingly, the activation of the suspended sentence will fall away if the appellant's appeal in Hungary succeeds.

69. However, it is necessary to make clear that the appellant is not being extradited for the embezzlement offence which gave rise to order 11.B.799/2013/2. In view of the principle of specialty under Article 27 of the Framework Decision, he cannot be required to serve the sentence which relates to this order. His extradition is solely for the offence of blackmail described in the EAW.

Lord Justice Treacy:

70. I agree.