Neutral Citation Number: [2021] EWHC 1778 (Admin)

Case No: CO/2902/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2021

Before:

MR JUSTICE JAY

- -

Between:

MUNICIPAL COURT OF BACÄU, ROMANIA **Appellant**

- and –

ELENA SPIRACHE **Respondent**

- -
- -

David Ball (instructed by **CPS**) for the **Appellant**
Natasha Draycott (instructed by **Sonn Macmillan Walker**) for the **Respondent**

Hearing date: 10th June 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 30th June 2021 at 10.00am.

MR JUSTICE JAY:

Introduction

1. The Romanian Judicial Authority appeals against the decision of District Judge Ezzat given at Westminster Magistrates' Court on 11th August 2020 discharging Ms Elena Spirache under s. 20(7) of the Extradition Act 2003.

2. Hereafter, I will be referring to the parties as "the JA" and "the RP", and to the District Judge as "the DJ".

3. The appeal turns on a narrow issue, but I begin with some relevant factual background.

4. The EAW in this case was issued on 16th April 2019 and was certified by the NCA on 10th August 2019. It is a conviction warrant for two offences, essentially the trafficking of vulnerable women for the purposes of prostitution. For these matters, the RP received a sentence of five years' imprisonment.

5. According to the terms of the EAW, the RP was not physically present at her trial. It is said that she was personally summonsed at what we know to be her parents' address in Bacäu County, and was represented by "the chosen public defender". In that sense, as the EAW states, the RP was present through him. On my understanding of the EAW, the hearings took place on 21st November 2017 and 20th February 2018, and judgment was handed down on 20th December 2018. The EAW also alleges that the RP filed an appeal, and this was dismissed by the Bacäu Court of Appeal on 19th March 2019.

6. It is not clear from the terms of the warrant whether it is being said that the RP instructed the public defender herself (or via an agent, and with her knowledge); or whether the Romanian authorities did so on her behalf. However, the better, albeit far from conclusive, interpretation of para 4 of the Further Information dated 17th February 2020 is the latter.

7. At the hearing before the DJ, the RP raised a number of issues. She failed on four of these and no appeal point arises at this stage. I have adjourned consideration of the RP's out-of-time application for permission to appeal on Article 8 and medical grounds. The RP succeeded on her ground of appeal under s. 20 of the 2003 Act.

8. Before addressing the District Judge's findings, it is convenient to set out the relevant provisions of s. 20 of the 2003 Act and of the Council Framework Decision of 13th June 2002, 2002/584/JHA ("the Council Framework Decision"). The latter was amended in 2009.

Relevant Legal Framework

9. Section 20 the Extradition Act 2003 provides in material part:

> "**Case where person has been convicted**
>
> (1) If the judge is required to proceed under this section (by virtue of section 11) he must decide whether the person was convicted in his presence.

> (2) If the judge decides the question in subsection (1) in the affirmative he must proceed under section 21.
>
> (3) If the judge decides that question in the negative he must decide whether the person deliberately absented himself from his trial.
>
> (4) If the judge decides the question in subsection (3) in the affirmative he must proceed under section 21.
>
> (5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial.
>
> (6) If the judge decides the question in subsection (5) in the affirmative he must proceed under section 21.
>
> (7) If the judge decides that question in the negative he must order the person's discharge."

10. Section 20 was enacted to give effect to the Council Framework Decision, which provides in material part:

> "**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."

11. Articles 90 and 91 of the Romanian Criminal Procedure Code provide:

"90. **Mandatory legal assistance provided to a suspect or defendant**

Legal assistance is mandatory:

a) when a suspect or defendant is underage, is admitted to a detention centre or an educational centre, when they are detained or arrested, even in a different case, and when in respect of such person a safety measure was ordered remanding them to a medical facility, even in a different case, as well as in other situations established by law;

b) when a judicial body believes that a suspect or defendant could not prepare their defence on their own;

c) during the course of trial, in cases where the law establishes life detention or an imprisonment penalty exceeding 5 years for the committed offence.

> 91. **Court appointed counsels**
>
> (1) In the situations listed under Art. 90, if a suspect or defendant did not select a counsel, the judicial body shall take steps to provide them with a court appointed counsel.
>
> …
>
> 466. **Reopening criminal proceedings in case of an in absentia trial of the convicted person**
>
> (1) The person with a final conviction, who was tried in absentia, may apply for the criminal proceedings to be reopened no later than one month since the day when informed, through any official notification, that criminal proceedings took place in court against them.
>
> (2) The following shall be deemed as tried in absentia: the convicted person who was not summoned to appear in court and had not been informed thereof in any other official manner, respectively, the person who even though aware of the criminal proceedings in court, was lawfully absent from the trial of the case and unable to inform the court thereupon. The convicted person who had appointed a retained counsel or a representative shall not be deemed tried in absentia if the latter appeared at any time during the criminal proceedings in court and neither shall the person who, following the notification of the conviction verdict, according to the law, did not file an appeal, waived filing an appeal or withdrew their appeal.
>
> (3) In the case of the person with a final conviction, tried in absentia, related to whom a foreign state ordered extradition or surrender based on the European arrest warrant, the time frame provided under para (1) shall begin from the date when, following their bringing into country, they receive the conviction verdict."

The Proceedings before the District Judge

12. The RP and her husband gave evidence before the DJ. She said that she came to the UK in 2008 and had not been back to Romania since. She met her husband in 2010 and had not been in contact with her parents or sister thereafter. Her husband is a Muslim and he has not been accepted by her family. The RP claimed that she had changed her phone number in 2010, and that there has been no communication by this means, or indeed any other, since that year.

13. The RP's husband gave different evidence. He told the DJ that his wife's parents came to the UK for a brief visit in 2012. They stayed at their home, and after the visit there were "a few problems".

14. It is also noteworthy that the RP's sister was convicted in Romania of involvement in the same trafficking offences. She served a period of imprisonment. The RP apparently found out about this when her husband saw the EAW and told her over the phone.

15. The DJ found that the RP gave untruthful evidence, which in the circumstances was a not altogether unsurprising finding.

16. On the s. 20 issue the following provisions of the DJ's ruling are relevant:

> "23. It is not in dispute that the RP was not present for her trial. The EAW does not indicate that the RP has a right to a retrial. A determination therefore must be made as to whether the RP deliberately absented herself from the trial. If she did not, then she should be discharged. The burden of proof is on the JA to the criminal standard.
>
> 24. The evidence in relation to the RP's knowledge of proceedings and her engagement in them comes from the EAW, FI and from the RP herself.
>
> 25. The JA rely on the fact that they served notice of the hearing on the RP at her last known address. That being the address of her parents. The RP's father signed to confirm receipt of the summons. The JA say that it is implausible that the RP's father would not contact his daughter should a summons be served on him. They argue that this would be the case in 'normal' circumstances, but in this case the RP's sister had already been prosecuted for similar offending. The JA say in circumstances where one daughter is already being prosecuted for such offending it is simply not believable that he would not have informed his daughter of the summons.
>
> 26. The JA rely on the fact the RP was represented at trial by her 'chosen defender'. They refer to the case of *Cretu* arguing that a RP who is represented by their chosen advocate at court is not deemed to be absent from their trial for the purposes of section 20.
>
> 27. The JA also suggest that there has been a 'manifest lack of diligence' on the RP's behalf in terms of her knowledge of, or attendance at, the trial. There is in my view no evidence to support such an assertion.
>
> 28. The RP argues that there is simply insufficient evidence to reach the conclusion that she deliberately absented herself. The RP submits that the service of the summons on her father did not amount to personal service and that there is no evidence to demonstrate that he informed her of the summons.
>
> 29. The RP argues that the Romanian authorities knew that she was not living in Romania at the time they attempted to serve the

> summons, noting that she was living in the U.K. The authorities record being told by the family that they were not in touch with the RP and that she was living in England.
>
> 30. There is insufficient evidence to prove that the RP was informed of proceedings by her father.
>
> 31. The RP denies instructing a lawyer at any time, whether that be at the initial trial or subsequent appeal. The RP points to a lack of supporting evidence to prove that she instructed a lawyer. The only documentary evidence relating to the instruction of a lawyer at any stage in proceedings refers to an appeal notice that has an illegible signature on it and that was sent from a location that no one suggests the RP was at.
>
> 32. In her evidence I found the RP to have been untruthful about the nature and the extent of her relationship with her parents. In her evidence and in the skeleton argument submitted on her behalf she states that the relationship she had with her parents broke down following her entering a relationship with her partner. She denied having any contact with her parents since 2010. When the RP's partner gave evidence, he described the RP's parents coming to visit in the UK in 2012. and staying with the RP for the duration of the visit.
>
> 33. Listening to the RP and her husband's evidence, the impression given was of 2 people who were not able to get their stories straight. I found the RP to be dishonest in terms of her description of her relationship with her family.
>
> 34. The RP has been either inaccurate and/or dishonest about her relationship with her family. This throws into doubt what she claims to have been told or not told by her father about the summons. That said, the burden rest on the JA and the JA can go no further than suggesting that it is implausible that the RP's father would not have told her of the summons. It may be unlikely that he did not pass on the information but it is by no means conclusive.
>
> 35. I have deep suspicions about the RP's knowledge of proceedings and therefore whether her absence from them was deliberate. While the evidence before the court is suggestive of knowledge and therefore a voluntary absence, I cannot be sure that is the case."

17. The DJ therefore discharged the RP under s. 20(7).

Grounds of Appeal

18. By Ground 1, it is argued that the DJ has failed to apply mutual trust and confidence to the statement in the warrant that the RP was represented by her "chosen" defender. He

should have considered that she was represented by her chosen defender and therefore that she was not, for the purposes of section 20, absent from her trial. It is said that the DJ has erred by failing to apply *Cretu v Romania* [2016] 1 WLR 3344, para 34(iii).

19. By Ground 2, it is argued that if the DJ found that the RP was not represented by a defender she had a role in choosing, then he should have considered whether she was entitled to a retrial. If he had done so then he would have concluded that she was entitled to a retrial. It is said that the DJ has erred by failing to apply *BP v Romania* [2015] EWHC 3417 (Admin), para 44.

These Grounds Developed

20. Mr David Ball for the JA submitted that the RP was caught between a rock and a hard place. The rock took the form of para 34(iii) of *Cretu*, from which it was clear that under Romanian law the RP, being represented by her chosen public defender, was deemed to be present at the trial. The DJ erred in conducting a factual inquiry which was unnecessary. The hard place took the form of para 44 of *BP*, which made it clear that after her surrender to the Romanian authorities the RP was entitled to a retrial if her primary case – that she had not been personally served - were right. If her primary case were incorrect, she could have no basis for complaint.

21. Mr Ball submitted that the terms of the EAW were conclusive, and that the principle of mutual trust and confidence should have restrained the DJ from going any further.

22. In his written argument, but less so orally, Mr Ball contended that on all the available evidence the DJ should have concluded that the RP had given a personal mandate to her lawyer. Mr Ball relied on the RP's untruthful evidence as to lack of contact with her family, the father's knowledge derived from the conviction of the RP's sister for the same offence, and the inherent implausibility of the father saying nothing about any of this to his daughter.

The RP's Riposte

23. Ms Natasha Draycott on behalf of the RP submitted that the EAW was unclear as to whether it was being said that the RP had personally chosen her lawyer, but the Further Information dated 17th February 2020 resolved that dubiety. She further submitted that para 34(iii) of *Cretu* did not preclude all factual inquiry. If, for example, the position was that the Romanian authorities had chosen the RP's lawyer without her knowledge, then some investigation would be required as to whether she had been made aware of the scheduled trial date by some other means.

24. As for Ground 2, Ms Draycott submitted that para 44 of *BP* was wrongly decided and that I should not follow it. There was no guarantee that on return to Romania the RP would be able to vindicate her right to a retrial.

Discussion

25. In *Cretu*, the Divisional Court (Burnett LJ and Irwin J) held:

> "31. A leading decision of the Strasbourg court on this topic is *Colozza v Italy* (1985) 7 EHRR 516 which held that an accused

had a right to be present and take part in criminal proceedings but that a trial in absentia could be acceptable if the state had diligently but unsuccessfully given the accused notice of the hearing. The Strasbourg court applies a principle that depends upon "unequivocal waiver". The question whether to proceed with a trial in the absence of an accused in the court of a Convention state would involve an inquiry which was heavily fact specific. So too, would any subsequent complaint to the Strasbourg court of a breach of article 6.

32. However, in the context of a request to surrender a convicted person to a Part 1 country to serve a sentence, in my judgment no such inquiry is called for. The requesting judicial authority is expected to convey the relevant information in the EAW itself. If the information meets the requirements of article 4a that would provide the evidence upon which the executing judicial authority would act. The trial has, of course, already taken place. The decision whether to proceed in the accused's absence has been made. It may have involved a conclusion that a trial in absentia is compliant with article 6 or (as is the case in some jurisdictions) have proceeded in the full knowledge that if the accused were convicted but was later found, he would be entitled to a retrial. The Framework Decisions do not contemplate an investigation by the courts of one member state into the circumstances in which a court of another member state decided to proceed in the absence of an accused. Still less could it be consistent with the concept of mutual confidence that courts in one member state should be making findings on past compliance with article 6 of the Convention in the courts of the other member states.

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

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

(i) "Trial" in section 20(3) of the 2003 Act must be read as meaning "trial which resulted in the decision" in conformity with article 4a(1)(a)(i). That suggests an event with a "scheduled date and place" and is not referring to a general prosecution process, Mitting J was right to foreshadow this in Bicioc's case.

(ii) An accused must be taken to be deliberately absent from his trial if he has been summoned as envisaged by article 4a(1)(a)(i) in a manner which, even though he may have been unaware of

the scheduled date and place, does not violate article 6 of the Convention.

(iii) An accused who has instructed ("mandated") a lawyer to represent him in the trial is not, for the purposes of section 20, absent from his trial, however he may have become aware of it.

(iv) The question whether an accused is entitled to a retrial or a review amounting to a retrial for the purposes of section 20(5) , is to be determined by reference to article 4a(1)(d).

(v) Whilst, by virtue of section 206 of the 2003 Act, it remains for the requesting state to satisfy the court conducting the extradition hearing in the United Kingdom to the criminal standard that one (or more) of the four exceptions found in article 4a applies, the burden of proof will be discharged to the requisite standard if the information required by article 4a is set out in the EAW.

35. It will not be appropriate for requesting judicial authorities to be pressed for further information relating to the statements made in an EAW pursuant to article 4a save in cases of ambiguity, confusion or possibly in connection with an argument that the warrant is an abuse of process. The issue at the extradition hearing will be whether the EAW contains the necessary statement. Article 4a is drafted to require surrender if the EAW states that the person, in accordance with the procedural law of the issuing member state, falls within one of the four exceptions. It does not contemplate that the executing state will conduct an independent investigation into those matters. That is not surprising. The EAW system is based on mutual trust and confidence. Article 1 of the 2009 Framework Decision identifies improvement in mutual recognition of judicial decisions as one of its aims. It also contemplates surrender occurring very shortly after an EAW is issued and certified. To explore all the underlying facts would generate extensive satellite litigation and be inconsistent with the scheme of the Framework Decision. Article 4a provides additional procedural safeguards for a requested person beyond the provision it replaced in the original version of the Framework Decision, but it does not call for one member state in any given case to explore the minutiae of what has occurred in the requesting member state or to receive evidence about whether the statement in the EAW is accurate. That is a process which might well entail a detailed examination of the conduct of the proceedings in that other state with a view to passing judgment on whether the foreign court had abided by its own domestic law, EU law and the Convention. It might require the court in one state to rule on the meaning of the law in the other state. It would entail an examination of factual matters in this jurisdiction, on which the foreign court had already come to conclusions, but on

> partial or different evidence. None of that is consistent with article 4a of the Framework Decision.
>
> 36. Should a requested person be surrendered on what turns out to be a mistaken factual assertion contained in the EAW relating to article 4a, he will not be helpless. He would have the protections afforded by domestic, EU and Convention law in that jurisdiction …"

26. These passages were followed by a differently constituted Divisional Court in *Domi v Italy* [2021] EWHC 923 (Admin): see, in particular, the judgment of Carr LJ at para 106.

27. I confess that during the hearing I was quite strongly attracted by an approach to para 34(iii) of *Cretu* which held that in the particular circumstances of the present case some limited inquiry was necessary into the question of whether the RP had personal knowledge of the scheduled trial date. My interpretation of the available evidence was that the Romanian state authorities had appointed a public defender to represent the RP's interests, rather than the RP herself, and that the real question was whether it could be proved to the criminal standard that the RP must have found out about the criminal proceedings from her father. The subordinate clause, "however he may have become aware of it", appeared to indicate that at the very least it was necessary to determine whether via whatever route, proof of personal service being unnecessary, the RP had become aware of her criminal case.

28. However, I have concluded that this is not the correct approach. Para 34(iii) of *Cretu* must be read in context. A person who has instructed a lawyer to act on her behalf to represent her at her trial must, by definition, have found out about the criminal proceedings otherwise such instructions would not have been given. All that the subordinate clause is doing is making it clear that on the foregoing factual scenario there need not have been personal service. Finding out by whatever means would do – provided that this is proved to the criminal standard. I reiterate that in a situation where there is evidence that the RP has personally instructed a lawyer, such proof would be almost self-evident.

29. So, para 34(iii) is not covering a situation where the RP may have had a lawyer appointed for her by the relevant State, the RP being ignorant at all material times of the underlying criminal proceedings. It is true that on this factual scenario the hypothesis must be that the RP was not personally served (as here) and was not informed by some other means (as she claims here). However, to ascertain whether the RP's claim is correct must entail exactly the sort of factual inquiry that Burnett LJ, as the then was, has deemed to be inappropriate. Although there is evidence that at the very least calls into question the assertions made in the EAW that the RP chose her lawyer (albeit there is considerable ambiguity as to who did the choosing) and that she was personally served, the courts in this jurisdiction are poorly equipped to investigate these issues. This difficulty is highlighted by the nature of the exercise the DJ purported to carry out in the present case. In any event, there is an important, anterior question of principle: the tenets of mutual trust and confidence preclude the very inquiry that was undertaken.

30. Mr Ball slightly muddied the waters, if I may say so, by advancing the written submission I have summarised under §22 above. Had it been a question of deciding whether the DJ's conclusion, applying the criminal standard of proof, that the RP was not informed by her father of the summons was correct, I would have held that this conclusion could not be upset on appeal. Be that as it may, I can accept Mr Ball's oral arguments as being correct, and uphold the JA's appeal on Ground 1.

31. Ground 2 hinges on the decision of the Divisional Court in *BP*. At para 44, Mr Justice Cranston said this:

> "To my mind the appellant has an entitlement in this case to a retrial in Romania. Article 466 provides that. There is no discretion in the Romanian court to deny that right. Admittedly the Romanian court could decide that the appellant had appointed Mr Octavian to represent her, through her mother or otherwise, and therefore does not qualify for a retrial under Article 466. But that is a "procedural step", as it was described in *Nastase*. There Rafferty LJ held that, although the Italian court could theoretically refuse a retrial where it was satisfied that a requested person knew of the original proceedings and voluntarily absented himself, that was a procedural step which did not detract from the unconditional nature of the legal right. In this case the Romanian Judicial Authority has stated that in making the decision under Article 466 it will take into account the District Judge's conclusion that the appellant did not know Mr Octavian was acting for her and that it seemed that her mother was unaware of what was going on, but it is not "mandatory". Nothing more can be required on the Romanian Judicial Authority. We work on the basis of mutual trust between Convention states, especially if EU members. If the Romanian court finds that the appellant had not instructed the lawyer she is entitled under their law to a retrial. Consequently, the District Judge was correct in his conclusion that the section 20(5) is satisfied."

32. The effect of this reasoning and conclusion is that the possibility that this RP may have been "awarded" a lawyer by the Romanian authorities, and did not know of the criminal proceedings against her, is not a matter that can be raised in the context of these extradition proceedings. The RP's recourse is to litigate the issue upon her surrender in the context of an application for a retrial. As Burnett LJ explained at para 36 of his judgment in *Cretu*, she is not left helpless. Moreover, I cannot accept that *BP* is in some way inconsistent with *Cretu*.

33. Ms Draycott's submission that *BP* was wrongly decided falls, perforce, on deaf ears. I am bound by *BP* and it is not "plainly wrong" within the meaning of *ex parte Tal*. In any case, I consider that *BP* is correct.

34. It was not altogether clear from Mr Ball's argument whether he believed he could succeed on both of his grounds rather than one or other of them. I consider that he can. For the reasons I have given, Ground 2 also succeeds.

35. I delayed handing down judgment in this case until the judgment of Johnson J in *Cretu v Romania* [2021] EWHC 1693 (Admin) had been made available. Having now read it, my conclusions remain the same.

Disposal

36. The JA's appeal succeeds on both Ground 1 and Ground 2.