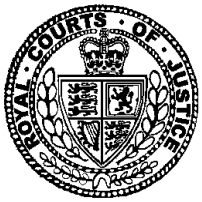

Neutral Citation Number: [2023] EWHC 463 (Admin)

Case No: CO/3796/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 3rd March 2023

Before :

MRS JUSTICE YIP DBE

- -

Between :

Zdravko Tihomiro Stefanov

Appellant

- and -

District Attorney of the Court of Venice, Italy

Respondent

- -
- -

Mr Malcolm Hawkes instructed by Central Chambers Law for the Appellant
Mr Jonathan Swain instructed by The Crown Prosecution Service for the Respondent

Hearing dates: 21 February 2023

- -

Approved Judgment

This judgment was handed down remotely at 2pm on Friday 3rd March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Yip DBE:

1. The appellant, Mr Stefanov, appeals against the decision of District Judge McGarva on 20 October 2021 to extradite him to Italy to serve a sentence of six years and 6 months' imprisonment for trafficking offences.

2. Before the District Judge, the appellant resisted extradition on three grounds: that the requirements under section 2 of the Extradition Act 2003 ("EA 2003") were not met; the passage of time (section 14 EA 2003) and that extradition was not compatible with his Article 8 rights (section 21 EA 2003).

3. The appellant raised three grounds of appeal:

   Ground 1: The judge erred in his approach to section 14 and that extradition for offences allegedly committed in 2007 would be unjust and oppressive;

   Ground 2: Although not specifically raised in the court below, the appellant having been convicted *in absentia* and having not deliberately absented himself, the respondent did not discharge the burden of proving that the appellant had the right to a retrial so that he must be discharged under section 20(7) EA 2003;

   Ground 3: The judge erred in finding that extradition did not constitute a disproportionate interference with the Article 8 rights of the appellant and his family (section 21).

4. Griffiths J granted permission to appeal on grounds 1 and 2 but refused permission on ground 3. The appellant renews his application for permission to proceed on that ground, albeit on a different basis from the way in which the ground was advanced at the time the papers were considered by Griffiths J. Relying on *Konecny v Czech Republic* [2019] UKSC 8, the appellant contends that the passage of time should also be considered under the rubric of section 21 and Article 8. The renewal application was submitted one day out of time due in part to a miscalculation on the part of his lawyers. The application was served on the due date but after 4.30pm. While compliance with time limits is always important, the appellant's representatives have been frank in accepting their error and no prejudice has been caused to the respondent. The appeal had been listed for a day in any event and it was possible to deal with the renewed application for permission on Ground 3 within the time allowed. The reality is that Ground 3, as now presented, overlaps significantly with Ground 1 upon which permission was granted. It is appropriate to consider the arguments about delay on the alternative basis now advanced under Ground 3. I therefore grant the short extension of time and grant permission to appeal on Ground 3, as revised.

5. The appellant seeks permission to adduce additional evidence on Ground 3, consisting of a short statement from the appellant's wife concerning his son's medical condition. I have also seen some medical records which were not before the District Judge. Although no formal application has been made to rely on this fresh evidence, I will consider it when I deal with Ground 3.

6. The appellant also applies to adduce fresh evidence on Ground 2 concerning the right to re-trial. The evidence which the appellant seeks to admit is expert evidence from Professor Saccucci, an expert in Italian criminal law and criminal procedure, whose

report is dated 18 November 2022. Professor Saccucci attended the hearing of the appeal and the parties agreed that I should hear his evidence *de bene esse*.

7. The afternoon before the hearing, the Respondent submitted an application to rely upon further evidence in response in the form of further information from the judicial authority. The appellant did not object to the admission of this fresh evidence on the basis that it clarified certain matters in his favour and was therefore considered helpful to him.

The arrest warrant and procedural background

8. The appellant's extradition is sought pursuant to a European arrest warrant ("EAW") issued and certified on 17 June 2019. The EAW relates to convictions for offences of exploiting females (one a minor) for prostitution, aggravated by threats of violence, committed in 2007. Although the warrant referred to three offences, further information clarified that there were two offences. The appellant denies that he committed the offences, maintaining that this is a case of mistaken identity. He says that the first he knew of the offences was when he was arrested in June 2021. He does accept that he is the person identified in the EAW and the accompanying photograph and no issue was raised under section 7 EA 2003.

9. The EAW was based on a decision of the Court of Venice dated 17 June 2010, confirmed by the Court of Appeal of Venice on 9 December 2019. That decision became "irrevocable" on 26 June 2020. The warrant is endorsed that the appellant was notified in October 2010 of the right to a new trial or appeal, and that the decision was appealed by the appellant's lawyer on 21 October 2010.

10. The District Judge found that the provisions of section 2 EA 2003 had been complied with. That finding is not challenged.

11. It is common ground that the appellant was convicted in his absence. The court found him to be unlawfully at large and proceeded in his absence. In accordance with Italian procedure, he was represented by a court-appointed lawyer. The respondent has confirmed that the lawyer was appointed without instructions from him. Notice of his trial was sent to the court-appointed lawyer, again in accordance with Italian procedure. The lawyer lodged an appeal, again without instructions as Italian practice allows.

The ruling in the court below

12. Although considering the appellant's evidence about his time in Italy to be highly unsatisfactory, the District Judge felt unable to conclude to the criminal standard that he was a fugitive. The respondent does not challenge that conclusion. The respondent accepts that the appeal is to be considered on the basis that the appellant was not deliberately absent from his trial.

13. In considering section 14, the District Judge found that, since this was a conviction warrant, the relevant period was not the time since the offending took place but rather the period of only 16 months since the sentence was finalised. He found that it would not be unjust or oppressive to extradite the appellant by reason of the passage of time, notwithstanding that the offences were committed in 2007. The judge said that the seriousness of the offending and the length of sentence to be served outweighed the

time lapse. He acknowledged that "delay is always the enemy of justice" but found that the availability of telephone intercepts would assist the court and was evidence that could be objectively tested. He relied on Italy to uphold its Article 6 obligations.

14. Dealing with the appellant's arguments on Article 8 and section 21, the judge balanced the factors for and against extradition, noting in particular the seriousness of the offending involving the exploitation of women for prostitution with threats of violence. Against that, he noted that the appellant had lived in the United Kingdom for the last 13 years, had no convictions here and had a glowing reference from his employer. He took account of his family circumstances, including that he had three children, the younger two aged 13 and 16 still being dependent upon him and who would be disrupted and upset by his extradition. The judge concluded that the constant and weighty public interest in extradition was not outweighed by the impact on the appellant or his family.

15. The District Judge's judgment did not deal with the provisions of section 20, even in passing. Section 20 requires the court to decide whether the appellant was convicted in his presence and, if not, whether he deliberately absented himself from his trial. It is common ground that both questions are to be answered in the negative. On that basis, section 20(5) requires the court to decide whether the appellant "would be entitled to a retrial or (on appeal to a review amounting to a retrial". If answered in the negative, the judge must discharge the appellant under section 20(7). However, this issue does not appear to have been addressed at all during the extradition hearing. Counsel who appeared for the appellant in the court below (not Mr Hawkes) did not take the point.

Basis of the appeal

16. Section 27 EA 2003 sets out the conditions for allowing an appeal. Under section 27(3), an appeal may be allowed if "the appropriate judge ought to have decided a question before him at the extradition hearing differently". Section 27(4) applies where "an issue is raised that was not raised at the extradition hearing or evidence is available that was not available at the extradition hearing" and that issue or evidence would have resulted in the judge deciding a question before him differently. In both cases, the appeal will be allowed if the judge would have been required to order the requested person's discharge had the question been decided as it ought to have been.

17. The appellant contends that the District Judge reached the wrong conclusions under section 14 and section 21. Mr Hawkes contends that section 20 ought to have been raised but was not. Further, Professor Saccucci's evidence could have been sought for use in the court below but that step was not taken by the appellant's representatives. Had the section 20 issue been raised and the expert evidence presented to the District Judge, it is argued that he would have been required to order the appellant's discharge pursuant to section 20(7).

Ground 1: Section 14 – Passage of time

18. Section 14 provides as follows:

> "A person's extradition to a category 1 territory is barred by reason of the passage of time if (and only if) it appears that it

> would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have —
>
> (a)committed the extradition offence (where he is accused of its commission), or
>
> (b)become unlawfully at large (where he is alleged to have been convicted of it)"

19. Since this is a conviction warrant, the focus is upon the period of time since the appellant became unlawfully at large, that is the date upon which he was in contravention of a lawful sentence. The relevant decision was the confirmation by the Court of Appeal of Venice on 9 December 2019, which became "irrevocable" on 26 June 2020.

20. The appellant now accepts that the construction of section 14 adopted by the District Judge was correct, so that the relevant period of delay is that from the date his sentence was finalised. The District Judge identified this was a period of 16 months. Even if the earlier (December 2019) date were adopted, this makes no material difference to the outcome. However, the appellant contends that the judge was wrong not to reflect the unfairness of the enormous passage of time in his consideration of Article 8 under section 21, as clarified in *Konecny*. This is not how the arguments were advanced in the court below, or indeed in the original grounds of appeal. However, in *Konecny*, the Supreme Court recognised the unfairness that could result in considering the passage of time only under section 14, given the way in which the statute was drafted.

21. As the appellant therefore appears to acknowledge, the original Ground 1 was not advanced on the correct basis. Rather the delay in this case should properly be considered under the rubric of section 21 and Article 8, following the approach of the Supreme Court in *Konecny*. Consideration of the passage of time within the Article 8 balancing exercise required under section 21 is not subject to the same restrictions as arise under section 14. In the circumstances of this case, where the substantial period of delay arose between the commission of the offences and the date the appellant became unlawfully at large, the appropriate means of addressing the passage of time is via section 21 rather than section 14.

22. It follows that the District Judge's conclusion under section 14 was not wrong. The question of the passage of time is to be addressed when considering section 21, within the balancing exercise under Article 8. The threshold test there is one of disproportionality rather than injustice or oppression as under section 14. I shall return to this (and to the arguments originally advanced under Ground 1) when I consider Ground 3.

Ground 2: Section 20 – Right to retrial

23. As I have identified, it is common ground both that the appellant was not present and that he was not deliberately absent from his trial. The Court must therefore consider whether he would be entitled to a retrial or (on appeal) a review amounting to a retrial. Such a retrial or review must include "the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" (see section 20(8)).

24. The appellant does not found his argument solely upon Professor Saccucci's evidence. Indeed, permission was granted before the expert report was obtained. The appellant contended that the information before the court below about the availability of a retrial was ambiguous. The burden of proving that the requirements of section 20 are satisfied rests on the requesting judicial authority. The standard of proof is the criminal standard. The appellant argues that the evidence did not discharge that burden and that the District Judge should therefore have ordered the appellant's discharge. Further, he now contends that the fresh evidence from Professor Saccucci conclusively settles the retrial issue in his favour.

The fresh evidence application

25. The power to admit fresh evidence is to be exercised as part of the inherent jurisdiction of the High Court to control its own procedure. The underlying policy is whether it is in the interests of justice to admit the evidence. An important consideration is that extradition proceedings should not be delayed by attempts to introduce on appeal evidence which could and should have been relied upon below. Parliament has restricted the scope for allowing an appeal, as referred to above. An appeal on the grounds of fresh evidence requires that the evidence was not available at the extradition hearing and that the evidence is decisive in that it would have required the judge to decide a question before him differently and would then have been required to order the requested person's discharge. See *Hungary v Fenyvesi* [2009] EWHC 231 (Admin) and *Zabolotnyi v Hungary* [2021] UKSC 14.

26. At paragraph [33] of *Fenyvesi*, it was acknowledged that this court may occasionally have to consider evidence not available at the extradition hearing with some care, short of a rehearing but said:

> "The court will not however, subject to human rights considerations …, admit evidence, and then spend time and expense considering it, if it is plain that it was available at the extradition hearing. In whatever way the court may deal with questions of this kind in an individual case, admitting evidence which would require a full rehearing in this court must be regarded as quite exceptional."

27. The respondent contends that the evidence of Professor Saccucci should not be admitted. However, the Respondent belatedly served the further information, to which I have already referred and to which no objection was taken. The reality is that neither party had grappled with the section 20 issue and the evidential basis for it before the extradition hearing.

28. The parties' agreement that Professor Saccucci should attend to give evidence and be cross-examined went beyond the sort of careful consideration of fresh evidence without deciding its admissibility that was envisaged in *Fenyvesi* and was tantamount to agreeing to admit the evidence. The court then spent time hearing that evidence. Determining its admissibility now has become an artificial exercise and I take it into account, together with the further information served by the respondent, in determining the merits of Ground 2.

29. It certainly should not be thought that I am encouraging the obtaining of expert evidence of this nature after the decision at first instance. The fact that permission to appeal had already been granted on this ground is a relevant consideration. Further, I take the view that the respondent could and should have grappled with the evidential basis for establishing that the requirements of section 20 were satisfied at a much earlier stage. Indeed, it can be argued that without Professor Saccucci's evidence, there would have been no proper evidential basis for considering the existence of a right to retrial.

30. I do though have some reservations about Professor Saccucci's evidence. I did not think that he always displayed a wholly balanced approach. By way of example, his report referred to a decision of Fordham J in this court (*Ogreanu v Italy* [2020] EWHC 1254) but did not refer to the two subsequent Divisional Court decisions which cast doubt on the correctness of *Ogreanu*. While giving evidence, Professor Saccucci inadvertently referred to his "submissions" and had to be reminded that he was giving evidence as an expert rather than making submissions. I also thought that at times his evidence crossed the line as to what was appropriate expert evidence about the practice and procedure in another jurisdiction into matters that are for the court to determine. Having said that, I am satisfied that Professor Saccucci was doing his best to fulfil his duties as an expert and that when answering questions in court he was genuinely seeking to assist. His answers in cross-examination were considered and helpful.

31. In considering Professor Saccucci's evidence, I have regard both to his report and to the oral evidence he gave. For the reasons I have just outlined, I place greater weight on the evidence tested in court, which I believe reflected greater care and consideration than the conclusions reached in his report.

Section 20 analysis and conclusions

32. Given the concessions made by the respondent, I do not need to deal with the evidence about the appellant's absence from trial, notification of the proceedings or the basis upon which his lawyer was instructed. The key question is whether there is a right to a retrial, complying with section 20(5) and (8).

33. I begin by saying that I am unimpressed with the way in which the respondent has dealt with this matter, although that criticism does not extend to Mr Swain who appeared for the respondent and whose submissions were a model of clarity. Unfortunately, there is a thread running through previous caselaw of the Italian authorities providing less than clear information to assist with issues under section 20. It is now apparent that the information provided in the EAW was inaccurate and that the approach taken in the Respondent's Notice was wrong. That this was so was only confirmed by way of the further information served the afternoon before the hearing. Even now, the Italian authorities have provided no clear statement of the position with regard to the appellant's appeal rights, merely responding to aspects of Professor Saccucci's report. I must therefore look to the evidence given by Professor Saccucci and to the earlier caselaw to determine the section 20 issue. In doing so, I have firmly in mind that it is for the respondent to prove to the criminal standard that the requirements of section 20 are satisfied.

34. As set out by Professor Saccucci and as is common ground, the provisions of the Italian Code of Criminal Procedure (CCP) dealing with trials *in absentia* have been amended twice in response to decisions of the European Court of Human Rights. The first

amendment came in 2005. Professor Saccucci described this as an "emergency measure" to avoid all extraditions to Italy being halted. The second change came in 2014 and was described by Professor Saccucci as "major reform". The changes introduced in 2014 mean that there can be no trial where the defendant is not present and it has not been possible to serve him with notice of the hearing. Professor Saccucci said that under the present rules the appellant could not have been tried, as he was in 2010. The 2014 changes do not have retrospective effect. Therefore, the relevant provisions are those introduced by the 2005 amendment.

35. The 2014 changes introduced a new remedy pursuant to Article 629-bis CCP. This allows the person convicted in his absence to request the quashing of the judgment of conviction if he proves that his absence was due to non-culpable lack of knowledge of the proceedings. If that burden is discharged, the trial will start anew.

36. Notwithstanding the date of conviction and the fact that the 2014 changes are not retrospective, the appellant did file a request under Article 629-bis. The further information served by the respondent confirms that this was rejected by the Court of Appeal of Venice on 22 November 2021. The request was rejected as inadmissible as it was not accompanied by an appropriate power of attorney as required by the rules. The Court also identified that the request was out of time on the ground that time runs from the date of knowledge of the proceedings (here July 2021). The section 20 issue is therefore to be approached on the basis that the remedy under Article 629-bis is not available to the appellant. Mr Hawkes submits that this remedy is the only one within the Italian CCP that would guarantee the rights required under section 20(8). He argues that since it is known that it is not available, the respondent cannot establish that there is a right to a retrial as required by section 20(5).

37. The parties agree that the only remedy available to the appellant is the extraordinary appellate remedy under Article 175 CCP which allows the granting of a new time limit to lodge an appeal. Following the 2005 amendments, it is for the judicial authority to prove that the appellant had actual knowledge of the proceedings and that he deliberately avoided appearing at the hearing. Further, the time limit to submit a request is extended to 30 days from the date of surrender in extradition cases and the fact that a lawyer had previously lodged an appeal does not bar an application.

38. A successful application under Article 175 does not guarantee a full retrial. The appellant would then have to request a renewal of the trial evidentiary hearing, pursuant to former Article 603 CCP. This would require him to prove that his absence was due to unforeseeable circumstances, *force majeure* or to the fact that he was unaware of the proceedings. Professor Saccucci says that decisions of the Court of Cassation (the Italian Supreme Court) have confirmed that the granting of a new time limit under Article 175 does not bind the Court of Appeal with regard to granting a new evidentiary hearing.

39. In his report, Professor Saccucci suggested two difficulties which would be faced by the appellant in seeking a retrial through the Article 175 and Article 603 route. First, he suggested that a request under Article 175 would "most likely be bound to fail". That was because, under the pre-2014 rules, the appellant would be deemed to have legal knowledge though service on the court-appointed lawyer. Second, Professor Saccucci said that even if the appellant's Article 175 application succeeded, the right to have a fresh evidentiary hearing would still be uncertain. Even if granted, that would

not necessarily imply a full rehearing of all the evidence gathered at first instance and the appellant would face difficulties challenging the evidence taken in his absence. Professor Saccucci concluded that the appellant would not be entitled to a full retrial even if he fulfils the burden of proving that he did not have actual knowledge of the trial and that this was not due to his negligence, and that he could not avail himself of the full array of defence rights which he would have enjoyed had he not been convicted *in absentia*.

40. In his oral evidence, Professor Saccucci stated his belief that an application under Article 175 would fail. He said it would depend upon whether the judge had a more liberal approach but that the chances of it being granted are 'very little'. He said this was because under the pre-2014 rules legal knowledge (which was presumed through service on the court-appointed lawyer) was equated with actual knowledge. This, he said, would allow the prosecutor to easily object to the Article 175 application simply by showing that legal service had been achieved.

41. Professor Saccucci was asked about the judgment of the Court of Cassation no. 1805 delivered on 20 January 2011. That judgment was considered in the case of *Nastase v Italy* [2012] EWHC 3671. I was provided with an English translation of the Italian judgment. At paragraph 19 of *Nastase*, Rafferty LJ summarised the effect of that judgment as showing:

> "… that a person convicted in absentia whose term of appeal is restored may obtain the renewal of the proceedings on appeal, without exclusion of these benefits because the person was classified as a fugitive. A person tried in absentia and not aware of the proceedings shall always have the right to obtain the renewal of the trial under Article 603(4) of the Italian Code of criminal procedure."

42. Professor Saccucci agreed that was a correct interpretation of the judgment. That being so, I find it concerning that Professor Saccucci quoted very selectively from the judgment (at paragraph 91 of his report) and relied upon it as supporting the argument that the appellant's right to a retrial is substantially hindered. In fact, as Professor Saccucci acknowledged, judgment 1805 showed the Court of Cassation interpreting Article 603 of the CCP in light of Article 6 of the Convention. Professor Saccucci went on to say that the provisions had not been subject to consistent interpretation by the Court of Cassation. He identified that the same rules of legal precedent did not apply in Italy as in this country and that it is unfortunately not uncommon to find different interpretations in the decisions of the Italian Supreme Court. Some judgments, such as number 1805, will display a more 'liberal' interpretation whereas others are more 'formulistic' or 'legalistic'. In his report, he cited one example 'among many authorities', namely a decision handed down in March 2010. His note of that decision indicated that this was a decision to refuse an Article 603 application on the ground of lack of proof concerning the ignorance of the proceedings by the defendant. The Court of Cassation found that the decision under Article 175 did not bind the court with regard to a request under Article 603.

43. At paragraphs 93-95 of his report, Professor Saccucci said that the Court of Cassation has confirmed that it is for the Court of Appeal to determine whether to rehear the evidence. He stated "the case-law of the Court of Cassation is settled in stating that the

right to evidence of the person convicted *in absentia* is to be balanced with other constitutional principles, namely the principle of reasonable length of proceedings, the principle of non-dispersion of evidence, and the principle of mandatory prosecution." He then referred to *Ogreanu*, stating that the English High Court had already found that Article 603(4) appears to entail severe limitations to the accused's right to evidence. He made no reference to *Nastase* or to the later Divisional Court cases of *Dumitrache v Italy* [2021] EWHC 958 (Admin) and *Galusca v Italy* [2021] EWHC 3345 (Admin), both of which doubted that *Ogreanu* had been correctly decided. He maintained in his oral evidence that the judge retained a discretion as to how much evidence was heard. He suggested that the passage of time may have an impact on how much evidence was heard.

44. In cross-examination, Professor Saccucci agreed that the 2014 rules had been brought in to ensure compliance with Article 6 and confirmed that the Italian courts will in principle be bound by judgments of the European Court of Human Rights unless they consider them inconsistent with Italian law. He was asked whether there had been any decisions of the Court of Cassation since 2014 which interpreted the provisions in what he described as the legalistic way. He confirmed his report did not contain reference to any such decisions since 2014 and that he was not aware of any. He also confirmed that there have been no rulings of the European Court of Human Rights since 2014 that Italian courts have interpreted the provisions in a way that was not in accordance with Article 6. He did say he was aware of a number of pending cases.

45. The question of whether the provisions of Articles 175 and 603 met the requirements of section 20(5) and (8) was fully considered by the Divisional Court in *Nastase*. In her judgment, Rafferty LJ reviewed the earlier authorities, including *Gradica v Italy* [2009] EWHC 2846 (Admin), *Ahmetja v Italy* [2010] EWHC 3924 (Admin) and *Rexha v Italy* [2012] EWHC 3397 (Admin), concluding [42]:

> "An insuperable difficulty confronting the appellant is that UK jurisprudence has consistently found article 175 compatible with section 20."

46. It is, of course, right that each case must be determined on the basis of the evidence before the court. Mr Hawkes argues that the evidence of Professor Saccucci provides a completely different evidential basis from that in the cases previously considered. First, he argues that none of the previous authorities deal with the argument emerging from Professor Saccucci's evidence that a request pursuant to Article 175 would probably fail because it would be easy for the judicial authority to prove legal knowledge in accordance with the pre-2014 rules. Secondly, Mr Hawkes contends that Professor Saccucci's evidence casts doubt upon the view taken of the Court of Cassation judgment 1805 in *Nastase*. He says that the deference to be given to that judgment should be very different on the basis of the evidence before me now.

47. In summary, Mr Hawkes' submissions on behalf of the appellant are that the court cannot be confident that an application under Article 175 will succeed because of the risk of legal knowledge being equated with actual knowledge. Even if that hurdle is overcome, the court is unable to be sure that the appellant will be entitled to an evidential rehearing such as would comply with section 20(8). Therefore, the respondent has not discharged the burden of proving that the appellant would be entitled to a retrial within the meaning of section 20(5) and section 20(8). Mr Hawkes also

submits that the High Court decisions which have found Article 175 and Article 603 to comply with section 20 have been wrongly decided as the process does not provide an "entitlement" to a retrial. He urges me to follow *Ogreanu* instead.

48. For the respondent, Mr Swain contends that analysis of Professor Saccucci's evidence, as clarified orally, demonstrates that the interpretation of the rights under Article 175 and Article 603 in *Nastase* is correct. At its height, Professor Saccucci's evidence is that in some cases in the Italian courts there has been a more restrictive interpretation of Article 175. However, that is tempered by his acknowledgement that the Italian courts will follow Article 6. Professor Saccucci could not point to any decision since 2014 where they had not done so. Mr Swain also relied on *Galusca v Italy* (above) for a recent restatement of the principle that this court should proceed on the assumption that Italy, as a member state of the EU and a member state of the ECHR, will act in accordance with its obligations under Article 6 of the Convention. It is the respondent's position that there is nothing in the evidence before me that should lead to a different outcome from that in the established line of authorities, including *Nastase*, which have held that Articles 175 and 603 provide a sufficient guarantee to satisfy the requirements in section 20.

49. I maintain that the respondent could have been expected to provide clearer information about the appellant's right to a retrial once the issue under section 20 was raised. However, I am persuaded that the confirmation that the appellant will be able to apply under Article 175 coupled with the earlier consideration of the provisions of Article 175 and Article 603 in the UK jurisprudence provides a sufficient evidential platform for the respondent's assertion that the requirements of section 20(5) and (8) are satisfied. The evidence of Professor Saccucci then requires very careful attention to determine whether it changes the evidential picture so as to cast doubt upon the availability of the mandatory retrial rights set out in section 20. At all times, I remind myself that the burden of proof remains on the respondent and the standard of proof is the criminal standard.

50. The first point which is said not to have been dealt with in the earlier authorities is Professor Saccucci's suggestion that an application under Article 175 would most likely fail because the judicial authority could rely on legal knowledge of the proceedings through service on the lawyer. I reject this. I cannot see any basis for Professor Saccucci to make the assertion he does. Article 175, as amended in 2005, provided the remedy to allow trials to be reopened when a person had been convicted *in absentia*. Professor Saccucci's evidence confirms that it is standard Italian procedure for there to be a court appointed lawyer and for proceedings to be served on the lawyer. It follows that if legal knowledge were equated with actual knowledge in considering an Article 175 application by someone tried *in absentia*, such applications would never succeed except perhaps in rare cases where there had been a procedural failure. That is plainly not right. It would be inconsistent with the purpose of 2005 amendment to Article 175 as explained by Professor Saccucci. He has not cited any authority to substantiate his opinion on this issue.

51. The reality is that what is described by Professor Saccucci in relation to service is the presumption that applied at first instance prior to 2014. That is not relevant to consideration of how the Italian courts will interpret Article 175. In the course of these proceedings, the respondent has confirmed that the appellant was served via his court-appointed lawyer and that there is no evidence that he had effective knowledge of the

proceedings. In that context, the respondent confirms that the appellant will be eligible to apply under Article 175. Having identified this as the appropriate route to a retrial, I am satisfied that the respondent will not deny an application under Article 175 on the grounds of service on the lawyer. Nothing in Professor Saccucci's evidence casts doubt on that.

52. The appellant's second point that success on an Article 175 application does not automatically guarantee an evidential retrial is the point extensively considered in *Nastase*. The fact that, under Article 603, the appellant bears the burden of establishing that he did not know of the proceedings is merely a procedural requirement which does not prevent section 20(5) being satisfied (see *Nastase* at [45]). The contrary view expressed by Fordham J in *Ogreanu* was based upon a concession which the Divisional Court in *Galusca* concluded should not have been made (at [24]). No such concession is made in this case. I find that the position is as stated in *Nastase* and *Galusca.* The fact that the appellant will have to satisfy the procedural requirements under Article 603 does not mean that he is not entitled to a retrial as required under section 20(5).

53. The Court of Cassation acknowledged in their judgment 1805 that "an opportunity to file an appeal is per se insufficient if no remedies are in place to allow that person to be restored within his rights and prerogatives that he could exercise in the first-instance proceedings." Article 6 does not prevent the tribunal re-opening proceedings and renewing evidence from regulating the evidence as it sees fit (*Nastase* at [48]). Judgment 1805 confirms that a person tried in absentia who is unaware of the proceedings will always have the right to obtain renewal of the trial under Article 603. That is sufficient to satisfy the requirements of section 20(8).

54. The appellant argues that this court should afford less deference to judgment 1805 than was shown in *Nastase*. It is argued that things have moved on since *Nastase*. Whereas the court then viewed judgment 1805 as a definitive statement of the law applying principles of precedent as apply in our Supreme Court, Professor Saccucci's evidence shows this to be wrong. With respect, I am unable to accept this argument. I have explained my concerns about Professor Saccucci's report, in particular that he has quoted only part of judgment 1805 in a way that was, in my judgment, out of context. Judgment 1805 in fact shows the Court of Cassation taking a favourable approach, allowing a retrial under Article 603 even in the case of a fugitive. The appellant is in a stronger position as fugitivity is not asserted against him. Professor Saccucci then refers to other Court of Cassation cases that have seemingly adopted a 'more open' approach by granting renewal of the trial evidentiary hearing irrespective of the standard of proof under Article 603. He asserts that even according to this latter case-law, "the renewal of the trial evidentiary hearing in appeal is never limitless and unfettered". That does not prevent the provisions complying with section 20(5), as confirmed in *Nastase*. While Professor Saccucci includes isolated quotes from two other Court of Cassation cases at paragraphs 93 and 94 of his report, such quotes do not demonstrate that the Court of Cassation arrived at a position that would not comply with section 20(5), any more than the isolated quote from judgment 1805 does. The oral evidence of Professor Saccucci confirms that since 2014 the Italian courts have recognised their obligations under Article 6 when dealing with applications from those convicted *in absentia*. There is no evidential basis to suggest that a different approach would be taken in this case, particularly where the respondent has confirmed in these proceedings that there is no evidence that the appellant was deliberately absent.

55. In the circumstances, the conclusions set out in the report of Professor Saccucci do not stand up to proper scrutiny. I am satisfied to the required standard that the appellant will be afforded a right to a retrial, complying with section 20(5) and section 20(8) through Articles 175 and 603.

56. It follows that, having considered the section 20 issue and the evidence of Professor Saccucci with care, I am not satisfied that had the issue been raised at the extradition hearing the District Judge would have been required to order the appellant's discharge under section 20(7).

Ground 3: Section 21 – Article 8

57. The thrust of the appellant's argument under this ground, as now advanced, is that the District Judge was wrong to conclude that extradition did not constitute a disproportionate interference with the Article 8 rights of the appellant and his family given the substantial passage of time since the alleged commission of the offences.

58. The appellant relies on *HH v Italy* [2012] UKSC 25 and *Konecny v Czech Republic* (above). As Baroness Hale made clear in *HH*, delay is an important consideration in the Article 8 balancing exercise and is capable of reducing the weight to be given to the public interest in extradition. *Konecny* confirms that the court can also have regard to any risk of injustice at the retrial flowing from the delay.

59. The appellant additionally relies upon the following factors:

    i) He has been in this country for 15 years and he and his family have settled status. Absence for over five years will cause him to lose his indefinite leave to remain and he may not be able to return upon completion of his sentence.

    ii) In December 2022, his 14 year old son was diagnosed with Scheuermann's disease (juvenile kyphosis) and is likely to require a significant operation.

    iii) Since his arrest in June 2021, the appellant has been subject to bail conditions, including an electronically monitored curfew. His liberty has therefore been restricted for a period of 20 months.

60. There is no doubt that there has been a very significant delay in this case. The offences date back to 2007. Professor Saccucci confirmed that a period of three years between the commission of offences and conviction would not be unusual but the period of almost ten years to conclude the appeal is very unusual. The respondent has offered no explanation for that. At the time of the extradition decision, 15 years had elapsed since the date of the offences.

61. Although the District Judge did not refer to *Konecny*, he did consider the question of delay, having regard to *HH* and treating the welfare of the children aged under 18 as a primary consideration. He put into the balance the fact that, at the time of the extradition hearing, the appellant had lived in this country for 13 years, had no convictions here and had a strong reference from his employer.

62. In dealing with the balancing exercise under section 21, the District Judge did not specifically consider the impact of the delay on the appellant's right to a fair trial.

However, his judgment must be read as a whole. He dealt with the impact of the delay in the context of the argument under section 14 given the way in which the appellant's case was advanced previously.

63. Ultimately, the judge concluded that the balance remained in favour of extradition notwithstanding the delay and the other factors relied on by the appellant. He noted that although the offending was old it was serious involving the exploitation of women for prostitution with the threat of violence.

64. In my judgment, the balance struck by the District Judge was not wrong, even allowing for the impact of the very substantial delay.

65. The appellant speculates that prosecution witnesses may no longer be available and says that it will be difficult for him to assemble evidence to support an alibi defence. He does not go beyond that assertion or give specific examples of evidence that he says would have been available but is no longer available.

66. The Italian courts will no doubt have to give careful consideration to any evidential difficulties caused by the substantial passage of time in this case. This court is entitled to assume, in the absence of clear evidence to the contrary, that such issues will be dealt with fairly by the court of trial (see *Symeou v Greece* [2009] EWHC 897 (Admin) at [61]).

67. Delay of this magnitude does diminish the public interest in extradition and so affects the balancing exercise. However, the nature and seriousness of the offences are such that the public interest is not easily outweighed even so long after the event.

68. The appellant's son has been diagnosed with Scheuermann's disease since the hearing in the court below. The medical evidence that has been produced confirms that he has been referred for physiotherapy and that his father is supporting him with that. It also confirms that he has been referred to the Royal London Hospital and is awaiting an appointment. Even to the untrained eye, the scans show an obvious deformity of the spine. The appellant's wife states that the hospital appointment is to take place on 24 March 2023 and further that she has been informed by a family friend who is a doctor in Turkey that the son will need an operation urgently. Although it would appear that the NHS are not treating the condition as urgent, I recognise that the family are facing uncertainty and real worry and that there is at least the prospect that he will require spinal surgery. Had that information been before the District Judge, it would have been another factor to put into the balance.

69. However, while not insignificant, I do not find that it tips the balance so as to now conclude that the District Judge would have been required to reach a different decision on the Article 8 balancing exercise had he had this evidence. Therefore, although I have considered this additional evidence with care, I do not find it would lead to a different outcome.

70. The same is true of the other factors relied upon, which may not have been fully developed in the arguments before the District Judge. It is fair to say that the balance in this case was far from one-sided. The significant and unexplained delay has diminished the weight of the public interest in favour of extradition. It is likely to have had at least some impact on the quality of the evidence and requires the appellant to

respond to allegations that are very old. In the intervening period, the appellant has built a strong family and working life in this country. However, the fact remains that these are very serious offences, the nature of which is such that there is a very strong public interest in the prosecution and punishment of those who commit them.

71. In the circumstances, even taking the new evidence about the appellant's son into account, and having carefully weighed the consequences of the considerable delay, I am unable to conclude that the District Judge's decision under section 21 was wrong.

Conclusion

72. I grant leave on Ground 3 and have considered each of the grounds advanced by the appellant carefully. Having done so, I have concluded that this appeal must be dismissed.