Case No: AC-2023-LON-001568

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

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 16 January 2025

NCN: [2025] EWHC 458 (Admin)

BEFORE:

MRS JUSTICE MAY DBE

BETWEEN:

DINCA

Claimant

- and -

DISTRICT COURT OF SECTOR 5 BUCHAREST (ROMANIA)

Defendant

MR M HENLEY (instructed by AM International Solicitors) appeared on behalf of the Claimant
MS K OLUWUNMI (instructed by CPS) appeared on behalf of the Defendant

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JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. MRS JUSTICE MAY: On 17 May 2023, District Judge Heptonstall ("the DJ") sitting at Westminster Magistrates Court ordered the appellant's extradition to Romania. The order was based on a conviction warrant issued on 21 July 2022 and certified by the MCA on 19 November 2022 ("the warrant"). Under the warrant, extradition was sought for the appellant to serve a sentence of one year imposed for a single offence of driving without a valid licence. The sentence was imposed pursuant to an enforceable judgment of the District Court of Sector 5 Bucharest dated 12 October 2021 which became final by non-appeal on 27 October 2021.

2. At the hearing before the DJ, extradition was opposed on a single Article 8 ground of interference with family life. Permission to appeal on that ground was refused, however at the renewal hearing, Heather Williams J granted permission to the appellant to rely on a new section 20 ground and gave permission to appeal on that ground. The appellant says that he has no right to a retrial in Romania and so his discharge must be ordered under section 20(7) of the Extradition Act 2003 ("the 2003 Act"), and it is that issue which is before me on this appeal.

The warrant and further information

3. The relevant parts of the warrant are these:

(1) **Box D** of the warrant was endorsed as follows:

- The Appellant did not appear in person at the trial resulting in the decision [**Box D.2**];
- The Appellant was not summoned in person but by other means actually received official information of the scheduled date and place of the trial which resulted in the decision, in such a manner that it was unequivocally established that he was aware of the scheduled trial and was informed that a decision may be handed down if he does not appear for the trial [**Box D.3.1b**];
- The Appellant was not personally served with the decision, but
    - The person will be personally served with this decision without delay after the surrender; and

- When served with the decision, the person will be expressly informed of his right to a retrial or appeal, in which he 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
- The person will be informed of the timeframe within which he has to request a retrial or appeal, which will be …. days. [**Box D3.4**]

- The Appellant was heard personally as a defendant in the present case, during the criminal prosecution phase, on which occasion the criminal charge was brought to his attention. During the trial phase, on 15/10/2021, the Appellant was summoned to the home address personally indicated by him, the summons being handed over to a relative of his [**Box D.4**].

(2) **Box E** set out that the Appellant fully admitted the committed act, declaring that he drove the Opel Astra vehicle on the Antiaeriana Road without holding a driving license.

4. Further information dated 30 January 2023 (FI1) confirmed:
   - On 10 November 2020 the decision to prosecute was made, when the Appellant was caught committing the offence [**FI1, paragraph 3**].
   - On 2 February 2021 the criminal charge was filed against the Appellant [**FI1 paragraph 3**].
   - On 16 February 2021 the Appellant was personally informed of the charges and endorsed receiving the same with his signature that he was also informed of his rights [**FI1 paragraph 2**].
   - On 20 March 2021 the Appellant again personally endorsed with his signature the charge against him, admitting to the commission of the offence before the criminal prosecution body [**FI1 paragraph 2**].
   - The Appellant declared that he wanted to be summoned at his home address during the criminal prosecution phase [**FI1 paragraph 5**].
   - The Appellant failed to appear at any court hearing, despite being summoned at the home address which he had indicated [**FI1 paragraph 5**].

- The Appellant was contacted by telephone at the number he had provided to inform him of the court hearings, but it was not possible to contact him, the number being unassigned [**FI1 paragraph 5**].
- A bench warrant was thereafter issued before the hearing on 5 October 2021, but the Appellant could not be found at his domicile, but the gendarmerie bodies were told by the Appellant's brother that he was in the UK but did not have a known address or telephone number to contact him [**FI1 paragraph 5**].
- The Appellant was aware that he was obliged to inform authorities of any change of address and was made aware in person failure to do so will maintain any summons as valid, with the Appellant being deemed to be aware of such summons. The Appellant failed to update the court or the prosecuting authorities of any change of address [**FI1 paragraph 6**].
- Having been properly summoned, in accordance with Romanian law to appear before Court, the Romanian authorities found and concluded that the Appellant had failed to comply with Court directions, failed to appear before the court and left his domicile voluntarily. The Judge found that the Appellant was deliberately absent by choosing not to appear before the court having been properly summoned and was aware of the date and place of the hearing [**FI1 paragraph 9**].

5. The final answer provided by the FI was in response to a question about representation at trial:

   "**10**. The [appellant]…was not represented during the criminal trial, the provisions of the Criminal Procedure Code not providing for the obligation of his legal assistance by an ex officio lawyer.

   Taking into account the manner in which the criminal trial was conducted, the judge finds that the convicted person… was aware of the criminal accusation against him, he was notified both verbally and in writing, under his person signature, that the respective trial was being conducted against him, consciously choosing not to appear before the court. Therefore, the judge finds that the provisions in the case of a trial in the absence of the convicted person are not relevant, because the defendant…has personally and officially become aware of the criminal accusation and the fact that a criminal trial was conducted against him."

The DJ's findings of fact and conclusion on section 20

6. The DJ made the following findings of fact at paragraphs 24 (iv) and (v) and 25 of his judgment:

> "(iv) [The appellant] was caught speeding on 20 September 2020 and told the police that he had a Spanish driving licence. A decision to prosecute was made on 10 November 2020. The charge was filed against him on 2 February 2021. On 16 February 2021, he was heard personally and told of his obligations, which included to notify of change of address. On 20 March 2021, he admitted the offence and was again informed of those obligations, he gave his Romanian address for the service of the summons and a Romanian mobile telephone.
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> (v) Within two weeks of that attendance, he and his family moved to the UK on 31 March 2021. He did that not only to seek work but to put himself beyond the reach of the Romanian authorities and thereafter he made no checks as to the service of the summons at the address he had provided and disconnected his Romanian telephone. I am not sure that he received the summons.
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> 25. For completeness, I set out that I am satisfied of all procedural elements in relation to the issue and certification of the warrant, the arrest, and services of documents."

7. The DJ's conclusion on section 20 is to be found at paragraphs 35 and 36 of his judgment where he recorded as follows:

> "35. There is no doubt that [the appellant] was not present at the relevant hearing. He did not know of the proceedings but did know that they were to be initiated. He was not convicted in his presence whether

directly or through a lawyer, so I must proceed under section 21(3). As set out above, I am satisfied that he had deliberately absented himself. Even if were wrong on that I would really find a manifest lack of diligence to the extent that amounts to deliberately absented himself so, by section 20(4) I must proceed under section 21.

36. If I am wrong about that, my section 20(5), I must consider whether [the appellant] would be entitled to a retrial or a review amounting to a retrial. Here, the relevant box is indicated on the warrant. There has been no evidence or argument to undermine the confidence that the Romanian authorities would provide such a retrial. Accordingly, I would still proceed under section 21, though through the gateway of section 20(6)."

The legal framework

8. Section 20 of the 2003 Act is headed, "Case where person has been convicted" and provides under 8 subsections as follows:

" (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.

(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights

(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;

(b) 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."

9. These provisions have received detailed consideration by the Supreme Court in two recent decisions handed down simultaneously: *Bertino v Public Prosecutor's Office, Italy* [2024] UK SC 9 and *Merticariu v Judecatoria Arad, Romania* [2024] UK SC 10. Both decisions post-dated the DJ's judgment in the case of this appellant.

10. *Bertino* considered the circumstances under which a court could conclude that a requested person had deliberately absented themselves from trial for the purposes of section 20(3) and in particular, whether it was necessary to show that the requested person had been warned that they could be tried and sentenced in his absence if they did not attend. Having considered the provisions of the 2003 Act and the Framework Decisions, the court went on to consider domestic, Convention and EU law on trial in absence, including the case of *Sejdovic v Italy* (Application No 56581/00) in which the Strasbourg court reviewed the relevant law. The question posed by the court in *Sejdovic* had been, "Whether [the requested person] could be regarded as having sufficient awareness of the prosecution and the trial, to be able to decide to waive his

right to appeal a trial or to evade justice." At paragraph 38 of its judgment the Supreme Court discussed to the Strasbourg court's reasoning:

> " 38. The court then referred in general terms to previous cases which had established that "to inform someone of a prosecution brought against him is a legal act of such importance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague and informal knowledge cannot suffice. It continued, at para 99:
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> "The Court cannot, however, rule out the possibility that certain established facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. This may be the case, for example, where the accused states publicly or in writing that he does not intend to respond to summonses of which he has become aware through sources other than the authorities, or succeeds in evading an attempted arrest … or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces."
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> This paragraph of its judgment sees the Strasbourg Court, in language that is familiar, carefully avoiding drawing hard lines. Cases are fact specific. It leaves open the possibility of a finding of unequivocal waiver if the facts are strong enough without, for example, the accused having been explicitly being told that the trial could proceed in absence. In *Sejdovic*, given that the argument for unequivocal waiver was based on no more than the applicant's absence from his usual address, coupled with an assumption that the evidence against him was strong, the court considered that the applicant did not have sufficient knowledge of the prosecution and charges against him. He did not unequivocally waive his right to appear in court: see paras 100 and 101."

11. At paragraph 45 of its judgment in *Bertino*, the Supreme Court observed that the phrase under section 20(3). "Deliberately absented himself from his trial" should be understood as being synonymous with the concept in Strasbourg jurisprudence that an accused has unequivocally waived his right to be present at the trial. The court went onto consider the principles as applied to the facts in *Bertino*, finding as follows at paragraph 50:

> "50. The appellant's dealings with the police both in Venice and Sicily fell a long way short of being provided by the authorities with an official "accusation." He knew that he was suspected of a crime and that it was being investigated. There was no certainty that a prosecution would follow. When the appellant left Italy without giving the judicial police a new address there were no criminal proceedings of which he could have been aware, still less

was there a trial from which he was in a position deliberately to absent himself. In those circumstances we conclude that the District Judge and Swift J erred in reaching the conclusion that he had deliberately absented himself from his trial."

12. At paragraph 54, the court observed that:

> "For a waiver to be unequivocal and effective, knowing and intelligent, ordinarily the accused must be shown to have appreciated the consequences of his or her behaviour. That will usually require the defendant to be warned in one way or another ...
> The Amended Framework Decision, reflecting an understanding of the obligations imposed by article 6, requires the summons to warn the accused that a failure to attend might result in a trial in absence ... "

13. At paragraph 55, the Supreme Court rejected the view that a "lack of diligence" resulting in ignorance of proceedings would of itself be sufficient to support a conclusion that an accused had deliberately absented himself from its trial. At paragraph 58, the court concluded as follows:

> "As we have already indicated, in *Sejdovic* at para 99 (see para 38 above), on which Miss Malcolm KC relied, the court was careful to leave open the precise boundaries of behaviour that would support a conclusion that the right to be present at trial had been unequivocally waived. The cases we have cited provide many examples where the Strasbourg Court has decided that a particular indicator does not itself support that conclusion. But behaviour of an extreme enough form might support a finding of unequivocal waiver even if an accused cannot be shown to have had actual knowledge that the trial would proceed in absence. It may be that the key to the question is in the examples given in *Sejdovic* at para 99. The court recognised the possibility that the facts might provide an unequivocal indication that the accused is aware of the existence of the criminal proceedings against him and of the nature and the cause of the accusation and does not intend to take part in the trial or wishes to escape prosecution. Examples given were where the accused states publicly or in writing an intention not to respond to summonses of which he has become aware; or succeeds in evading an attempted arrest; or when materials are brought to the attention of the authorities which unequivocally show that he is aware of the proceedings pending against him and of the charges he faces. This points towards circumstances which demonstrate that when accused persons put themselves beyond the jurisdiction of the prosecuting and judicial authorities in a knowing and intelligent way with the result that for practical purposes a trial with them present would not be possible, they may be taken to appreciate that a trial in absence is the only option. But such considerations do not arise in this appeal, where the facts are far removed from unequivocal waiver in a knowing and intelligent way."

14. In *Merticariu*, the Supreme Court considered section 20(5) and the right to retrial following a trial in absence. The relevant passages in the court's decision are to be found at paragraphs 23 to 29:

> "23. First, article 4a provides additional procedural safeguards for a requested person beyond the provisions in the FD 2002: *Cretu* at para 35. The most significant additional procedural safeguard for the purposes of this appeal was brought about by the deletion of paragraph 1 of article 5 and the insertion of article 4a(1)(d). Article 4a(1)(d) protects a person's right to be present at their trial, in circumstances where the person was convicted in absentia. The protection is achieved by providing a 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.
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> 24. Second, paragraph (1) of article 4a contemplates that the exceptions in article 4a(1)(a)-(d) will be established by statements in the EAW itself. Paragraph (1) does not envisage a general evidential inquiry into those matters, and 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. The requesting judicial authority is expected to convey the relevant information in the EAW itself, including information relating to absence from trial and the possibility of retrial, which is necessary to determine whether the executing judicial authority has the power to refuse to execute the warrant under article 4a. If the information set out by the requesting judicial authority in the EAW meets the requirements of article 4a that will provide the evidence upon which the executing judicial authority will act. If a requested person is surrendered on what turns out to be a mistaken factual assertion contained in the EAW relating to article 4a, then they will have the protections afforded by domestic, EU and Convention law in that jurisdiction: Cretu at paras 4, 24, 32, 35, 36 and 42.
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> 25. Third, article 4a does not require the executing judicial authority to refuse to order extradition if the requested person did not appear at their trial, even if none of the exceptions applies. In those circumstances whether surrender is ordered remains optional at the discretion of the executing judicial authority: *Cretu*, at paras 23, 35 and 36 and *TR v Generalstaatsanwaltschaft Hamburg* (C-416/20 PPU), at paras 51-52. Article 4a does not specify the circumstances in which discretion must be exercised. This means that there is no requirement for a conforming interpretation except in so far as an extradition order must not contravene the person's rights under the European Convention on Human Rights ("the Convention"). Accordingly, the discretion is to be exercised in accordance with domestic law as contained in section 20 of the 2003 Act. So, in this case if the circumstance in article 4a(1)(d) is not made out then the discretion to order surrender must be exercised in accordance with section 20(5) of the 2003 Act and in compliance with the Convention.

26. Fourth, sections 20 and 206 of the 2003 Act, interpreted in conformity with article 4a, require that the burden of proof to the criminal standard will be discharged by the requesting judicial authority if the information required by article 4a is set out in the EAW. The issue at the extradition hearing will be whether the EAW contains the necessary statement: *Cretu* at paras 34(v) and 35. For the purposes of section 20(5) of the 2003 Act a conforming interpretation means that if the requesting judicial authority has ticked box 3.4 of point (d) on the EAW then the executing judicial authority will be obliged to conclude that the appellant would be entitled to a retrial: Cretu at para 41.

27. Fifth, it will not be appropriate for the 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: Cretu at para 35. However, if the requesting judicial authority does provide further information there is no reason why that information should not be taken into account in seeking to understand what has been stated in the EAW: Cretu at para 37.

28. Sixth, the right to a retrial or an appeal in article 4a(1)(d)(i) is not an automatic right. Rather, the requested person must take the procedural step of requesting a retrial or an appeal within the specified time frame: article 4a(1)(d)(ii). The requirement to take a procedural step to invoke the substantive right to a retrial or an appeal is an ordinary feature of any application to invoke a substantive right.

29. Seventh, in circumstances where a person is surrendered under article 4a(1)(d), article 4a(3) requires that a retrial or appeal shall begin in the requesting state within due time after surrender. Accordingly, if box 3.4 in point (d) of an EAW is ticked by the issuing judicial authority and the requested person is surrendered on the basis of article 4a(1)(d) the only scope for the courts in the requesting state to decide that the requested person is not entitled to a retrial or on appeal to a review amounting to a retrial, would be on procedural grounds. If the requested person complies with the procedural steps, then there is an obligation to begin the retrial or the appeal. In this way the issuing judicial authority binds the court in the requesting state to begin the retrial or the appeal."

Fresh evidence

15. By a second further information dated 17 May 2024, the Romanian judge provided further details/confirmation in relation to box D paragraph 3.4 as follows:

> "We hereby confirm that the content of box D3.4 applies to the convicted person ... The appellant was not notified personally of the decision but the decision will be handed to him personally without delay, after surrender and when the decision is communicated to him, the person will be expressly informed about the right to apply for the reopening of the criminal proceedings, or to file an appeal where he has the right to be present and which allows a re-examination of the merits of the case, including new evidence and which can lead to the annulment of the initial decision and [the appellant] shall be informed of the period in which he has the right to request a retrial of the case or file an appeal which is one month from the date when after being brought to Romania, he is communicated the conviction decision."

The parties arguments

16. Relying on *Bertino*, Martin Henley, for the appellant, argued that the circumstances in this case fell far short of establishing that the appellant deliberately absented himself from trial. The finding that he left Romania within two weeks of being interviewed about the offence, at least in part to put himself beyond the reach of the Romanian authorities whilst establishing his fugitive status, was not sufficient to prove (to the criminal standard) that he waived his right to attend his trial. Mr Henley pointed out that the DJ's reasoning as to a failure of "due diligence" on the part of the appellant had been specifically disapproved by the Supreme Court in *Bertino*. Mr Henley stressed that foresight of a possible prosecution is no basis for interfering a waiver of the right to a fair trial. He pointed out that in this case, the appellant had not been represented at the police station or at trial, moreover that he had had no legal advice at any point.

17. Moving to the DJ's conclusion on section 20(5), Mr Henley submitted that the DJ wrongly failed to take into account the final paragraph of FI1 where, in answer to a question asking whether the appellant had been represented at his trial, the Romanian judge answered in the passage set out at [5] above. Mr Henley argued that this response plainly undermines what ticking box D3.4 would otherwise have suggested. The Romanian judge makes it clear that the appellant has no right at retrial as such, he has the right to apply for one, but Mr Henley submits that its answer shows the Romanian court will refuse to allow him to have one, having reached the view that he voluntarily waived his right to attend. Mr Henley suggested that it is apparent there is no real right to retrial. The subsequent information from May does not address the point, Mr Henley argued, it simply reiterated that the appellant has a right to apply, without confirming that he would get a retrial.

18. In response, Ms Oluwunmi for the requesting authority made the following points: as to the matter of deliberate absence from trial, she said that in this case the appellants behaviour was sufficiently egregious and determined to allow the court to find an unequivocal waiver and the DJ was correct to do so. Here the appellant admitted the offence, the police signed confirmation of his charge, he knew he was under an obligation to inform the authorities of a change of address and gave an address for service on the summons which he must have known would come, given his admission of guilt. He provided a mobile number to facilitate communication, only to disconnect that number shortly afterwards.

19. This was not a case of possible prosecution as in *Bertino*, Ms Oluwunmi suggests but rather a certain prosecution. Moreover, this appellant was no stranger to the criminal justice process having been prosecuted and convicted for several offences when resident in Spain. He must have known, she suggested, that a trial in his absence was the only option and, in those circumstances, his actions in avoiding the summons amounted to an unequivocal waiver of the right to attend his trial. This was more than evidence going to fugitive status, she said it shows a knowing and intelligent avoidance amounting to a waiver.

20. In the alternative and in any event, Ms Oluwunmi submitted that the Romanian authorities, by ticking box 3.4 on the warrant, confirmed that the appellant has a right to a retrial. Applying paragraphs 26 and 27 in *Merticariu,* the court here was and is bound to conclude that section 20(5) is satisfied. The information provided by the Romanian judge at answer 10 in FI1 was not in a response to a question about retrial rights and cannot be regarded as rescinding the guarantee provided by the ticking of box 3.4. But if there was any doubt of the existence of the right to retrial (which Ms Oluwunmi did not accept) then the recent further information dated 17 May 2024 reconfirms that the provisions of box 3.4 apply. The wording of box 3.4 is as required under the Framework Decision and guarantees a right of retrial. That is sufficient to ensure the appellant's right in this respect. She says the DJ did not err in finding that section 20(5) applied.

Decision

21. Dealing first with the fresh evidence contained in the latest information provided by the requesting authority on 17 May 2024, I propose to admit this evidence because it goes to the section 20 issue freshly advanced on this appeal and it is capable of being decisive: *Fenyvesi* applies.

22. However, notwithstanding the further information recently provided adding some further points to the chronology, I accept Mr Henley's submission that the facts as found by the DJ are not sufficient to establish an unequivocal waiver of a right to attend. The burden is on the requesting authority to prove waiver to a criminal standard, and whereas here the authority cannot show that the requested person has specifically been told that the trial may be heard in an absence, there is a need for strong evidence from which to infer waiver. The examples given by the Strasbourg court in the *Sejdovic* case cited by the Supreme Court in *Bertino* serve to demonstrate this. In my view, the warrant and further information provided falls short of that demanding requirement. It follows that on the law as it is following *Bertino*, I cannot conclude that the appellant deliberately absented himself from trial in accordance with section 20(3).

23. But that is not the end of the matter, since section 20(5) must then be considered. As to this, *Merticariu* is authority for the proposition that the court is not entitled to look any further than the tick in the box at section D3.4 of the warrant. I accept that there was some potential for ambiguity here, given the Romanian judge's response at paragraph 10 of FI1. However, any such ambiguity or doubt was conclusively resolved by the further information from May, confirming the correctness of the check in the box indicating the appellant's right of retrial. I do not accept Mr Henley's suggestion that the further information failed to address the concern arising from the responses in FI1 that any application for retrial would be refused. In my view, confirmation of the correctness of the tick in the box is sufficient. That wording provides a guarantee which can be relied upon without more, as *Merticariu* decided. That being so, it seems to me I am bound to find that the appellant has a right of retrial in Romania and that the requirements of section 20(5) and (8) are satisfied, as the DJ correctly determined.

24. It follows that this appeal must be dismissed. The order for the appellant's extradition stands.

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